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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Applicable Constitutional and Statutory Provisions	2
Statement	3
Summary of Argument	7
ARGUMENT:	
POINT I—A government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment	11
a. Delay and administrative hardship caused by preliminary hearings to determine the sufficiency of the evidence is no reason to deny to the accused his constitutional right to be indicted by a grand jury	24
b. Historical reasons	27
c. Grand jury secrecy	29
d. Errors committed by the grand jury may not be purged at the trial	30
e. The grand jury determination should not conclusively establish probable cause	31
POINT II—Written statements of Government witnesses in which they admit prior criminal acts involving moral turpitude should have been made available to the defense under the Jencks Act when the witnesses testified on direct that they "cooperated" with the Government and had been named as defendants in other cases involving the crimes which the witnesses admitted in their statements	33

PAGE

a. The statements relate to the credibility of the witnesses and therefore should have been turned over to the defense 35

b. The statements withheld from petitioner relate to that part of the direct testimony of the witnesses about other indictments and cooperation with the Government 37

c. Petitioner was prejudiced by the order refusing him inspection of the witnesses' statements 40

POINT III—Title 18 U.S.C. § 201(f) which prohibits a person from giving money to a public official "for the proper discharge of official duty" is inconsistent with Title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly" ... 49

a. Counts 10 through 12 and Counts 25 through 27, respectively 50

b. Counts 1 through 9 and Counts 16 through 24, respectively 52

POINT IV—Petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor 57

Conclusion 61

Appendix 62

CITATIONS

PAGE

Aguilar v. *Texas*, 378 U. S. 108 (1964) 13, 24

Anderson v. *United States*, 273 Fed. 20 (8th Cir. 1921) 18

Arnstein v. *United States*, 296 Fed. 946 (D. C. Cir. 1924) 18

Austin v. *United States*, 297 F. 2d 356 (4th Cir. 1961) 25

Ex parte Bain, 121 U. S. 1 (1887) 15

Battle v. *United States*, 345 F. 2d 438 (C.A.D.C. 1965) 25

Beatrice Foods Co. v. *United States*, 312 F. 2d 29 (8th Cir.) cert. denied 373 U. S. 904 (1963) 20

Beavers v. *Henkel*, 194 U. S. 73 (1904) 7, 15, 31

Beck v. *Washington*, 369 U. S. 541 (1962) 16, 31

Brady v. *United States*, 24 F. 2d 405 (8th Cir. 1928) 17, 19, 20

Cassel v. *Texas*, 339 U. S. 282 (1950) 21, 31

Clancy v. *United States*, 365 U. S. 312 (1961) 42, 47, 48

Cooper v. *United States*, 247 Fed. 45 (4th Cir. 1917) 18

Coppege v. *United States*, 311 F. 2d 128 (D. C. Cir. 1962) cert. denied 373 U. S. 946 (1963) 20

Costello v. *United States*, 350 U. S. 359 (1956) .. 8, 13, 14, 15, 17, 19, 20, 21, 22, 23, 24, 26, 27, 31

Cox v. *Vaught*, 52 F. 2d 562 (10th Cir. 1931) 20

Czarlinsky v. *United States*, 54 F. 2d 889 (10th Cir. 1931) cert. denied 285 U. S. 549 (1932) 18

Davis v. *United States*, 37 App. D. C. 126 (1911) 55

Dennis v. *United States*, 384 U. S. 855 (1966) 48

Duarte v. *United States*, 171 F. 2d 971 (5th Cir. 1949) 20

Ewing v. *Mytinger & Casselberry*, 339 U. S. 594 (1950) 15

Foster v. *United States*, 282 F. 2d 222 (10th Cir. 1960) 37

PAGE

Freshman v. *Atkins*, 269 U. S. 121 (1925) 37

Friscia v. *United States*, 63 F. 2d 977 (5th Cir.) cert. denied 289 U. S. 762 (1933) 19

In re Fried, 161 F. 2d 453 (2d Cir.), cert. dismissed, 332 U. S. 807 (1947) 16

Fulton v. *United States*, 45 App. D. C. 7 (1916) 55, 56

Gates v. *United States*, 122 F. 2d 571 (10th Cir. 1941) cert. denied 314 U. S. 698 (1942) 18

Gebardi v. *United States*, 287 U. S. 112 (1932) 58, 60

Giordenello v. *United States*, 357 U. S. 480 (1958) ..15, 31

Hale v. *Henkel*, 201 U. S. 43 (1906) 15, 16

Hillman v. *United States*, 192 Fed. 264 (9th Cir. 1911) 18

Holt v. *United States*, 218 U. S. 245 (1910).....17, 18, 24

Hurtado v. *California*, 110 U. S. 516 (1884) 15

Jencks v. *United States*, 353 U. S. 657 (1957) 48

Jones v. *United States*, 362 U. S. 257 (1960) 7, 13

Kaufman v. *Liberty Mutual Fire Ins. Co.*, 300 F. 2d 547 (2d Cir. 1962) 37

Kastel v. *United States*, 23 F. 2d 156 (2d Cir. 1927) cert. denied 277 U. S. 604 (1928) 29

Lawn v. *United States*, 355 U. S. 339 (1958) 13, 21, 30

Livezey v. *United States*, 279 Fed. 496 (5th Cir. 1922) 18

Marquez-Anaya v. *United States*, 319 F. 2d 610 (5th Cir. 1963) 54, 56

May v. *United States*, 175 F. 2d 994 (D. C. Cir.), cert. denied 338 U. S. 830 (1949) 60, 61

McKinney v. *United States*, 199 Fed. 25 (8th Cir. 1912) 18

McNabb v. *United States*, 318 U. S. 332 (1943) 13

Mesarosh v. *United States*, 352 U. S. 1 (1956) 11, 13

PAGE

Montgomery v. *United States*, 203 F. 2d 887 (5th Cir. 1953) 36

Murdick v. *United States*, 15 F. 2d 965 (8th Cir. 1926), cert. denied sub. nom *Clarey* v. *United States*, 274 U. S. 752 (1927) 18

Nanfito v. *United States*, 20 F. 2d 376 (8th Cir. 1927) .. 19

Nardone v. *United States*, 308 U. S. 338 (1939) 25

Nye and Nissen v. *United States*, 336 U. S. 613 (1949) 60

Ogden v. *United States*, 303 F. 2d 724 (9th Cir. 1962) .. 35, 39

Ex parte O'Leary, 53 F. 2d 956 (7th Cir.), cert. denied 283 U. S. 830 (1931) 61

Olmstead v. *United States*, 19 F. 2d 842 (9th Cir. 1927), aff'd 277 U. S. 438 (1928) 18

Palermo v. *United States*, 360 U. S. 343 (1959) 40

People v. *Barnes*, 197 Misc. 477, 98 N.Y.S. 2d 481 (1950) 27

People v. *Gentile*, 20 A. D. 2d 412, 247 N.Y.S. 2d 551 (1st Dept. 1964) 27

People v. *Glen*, 173 N. Y. 395 (1903) 26

People v. *Hirschberg*, 37 N.Y.S. 2d 861 (1942) 26

People v. *Howell*, 3 A. D. 2d 153, 158 N.Y.S. 2d 985 (1st Dept. 1957), aff'd 3 N. Y. 2d 672 (1958) 26

People v. *Mitchell*, 140 Misc. 869, 251 N.Y.S. 716 (1931) 26

People v. *Nitzberg*, 289 N. Y. 523 (1943) 26

People v. *Pryor*, 11 N.Y.S. 2d 393, aff'd 283 N. Y. 623 (1940) 26

People v. *Sweeney*, 213 N. Y. 37 (1914) 26

People v. *Valerino*, 54 N.Y.S. 2d 521 (1945) 26

Pierre v. *Louisiana*, 306 U. S. 354 (1939) 8, 21

Reg. v. *Gerrans*, 13 Cox 158 (1876) 27

PAGE

Reg v. *Bullard*, 12 Cox 353 (1872) 27

Rosenberg v. *United States*, 360 U. S. 367 (1959) 9, 34, 35, 39, 47

Simon v. *United States*, 123 F. 2d 80 (4th Cir.), cert. denied 314 U. S. 694 (1941) 36

Stirone v. *United States*, 361 U. S. 212 (1960) 24

Thomas v. *United States*, 314 F. 2d 936 (5th Cir.), cert. denied 375 U. S. 849 (1963) 54, 56

Tinkoff v. *United States*, 86 F. 2d 868 (7th Cir. 1937) 18

United States v. *Andrews*, No. 30763, 2d Cir. Aug. 9, 1967 .....22, 23

United States v. *Aviles*, 274 F. 2d 179 (2d Cir.), cert. denied 362 U. S. 974 (1960) 19

United States v. *Beadon*, 49 F. 2d 164 (2d Cir.), cert. denied 284 U. S. 625 (1931) 19

United States v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964), cert. denied sub. nom *Mogavero* v. *United States*, 379 U. S. 960 (1965) 22, 23, 35

United States v. *Cardillo*, 316 F. 2d 606 (2d Cir.), cert. denied 375 U. S. 822 (1963) 40

United States v. *Cimino*, 321 F. 2d 509 (2d Cir. 1963), cert. denied 375 U. S. 974 (1964) 19, 20, 22

United States v. *Daigle*, 149 F. Supp. 409 (D.C.D.C.), aff'd 248 F. 2d 608 (D. C. Cir. 1957), cert. denied 355 U. S. 913 (1958) 54, 56

United States v. *Daly*, 65 Cr. 312, E.D.N.Y., April 28, 1967 22

United States v. *Dietrich*, 126 F. 664 (C.C.D. Neb. 1904) 59

United States v. *Ellenbogen*, 341 F. 2d 893 (2d Cir. 1965) 47, 48

United States v. *Holmes*, 168 F. 2d 888 (3d Cir. 1948) 18

United States v. *Holte*, 236 U. S. 140 (1915) 61

PAGE

United States v. *Johnson*, 319 U. S. 503 (1943) 12, 40

United States v. *Johnson*, 337 F. 2d 180 (4th Cir. 1965), cert. denied *sub. nom Edlin* v. *United States*, 385 U. S. 846 (1966) 12, 40

United States v. *Katz*, 271 U. S. 354 (1926) 59, 60

United States v. *Kenner*, 354 F. 2d 780 (2d Cir. 1965), cert. denied 383 U. S. 958 (1966) 57, 60

United States v. *Labate*, 270 F. 2d 122 (3d Cir.), cert. denied 361 U. S. 900 (1959) 20

United States v. *Laughlin*, 226 F. Supp. 112 (D.C.D.C. 1964) 22

United States v. *Lennon*, 148 F. Supp. 492, aff'd 246 F. 2d 24 (2d Cir.), cert. denied 355 U. S. 836 (1957) 20

United States v. *Masino*, 275 F. 2d 129 (2d Cir. 1960) 36

United States v. *Morse*, 292 F. 273 (S.D.N.Y. 1922) .. 24

United States v. *New York Cent. & H.R.R. Co.*, 146 F. 298 (C. C. S.D.N.Y. 1906), aff'd 212 U. S. 481 (1909) 59

United States v. *Nunan*, 236 F. 2d 576 (2d Cir. 1956), cert. denied 353 U. S. 912 (1957) 18

United States v. *Pappagoda*, 288 Fed. 214 (D.C.D. Conn. 1923) 30

United States v. *Payton*, 363 F. 2d 996 (2d Cir.), cert. denied 385 U. S. 993 (1966) 22, 23

United States v. *Perlman*, 247 Fed. 158 (2d Cir. 1917) 29

United States ex rel. Potts v. *Rabb*, 141 F. 2d 45 (3d Cir.), cert. denied 322 U. S. 727 (1944) 19

United States v. *Ramsey*, 315 F. 2d 199 (2d Cir.), cert. denied 375 U. S. 883 (1963) 19

United States v. *Reed*, 27 Fed. Cas. No. 16,134, p. 727 (C.C.N.D.N.Y. 1852) 29

PAGE

United States v. *Remington*, 191 F. 2d 246 (2d Cir.), cert. denied 343 U. S. 907 (1952) 30

United States v. *Sager*, 49 F. 2d 725 (2d Cir. 1931) .. 59

United States v. *Tane*, 29 F.R.D. 131 (E.D.N.Y. 1962) 20

United States v. *Tolub*, 187 F. Supp. 705 (S.D.N.Y. 1960) 20

United States v. *Wells*, 163 F. 313 (D.C.D. Idaho 1908) 16

United States v. *Wenzel*, 311 F. 2d 164 (4th Cir. 1962) 40

United States v. *Whiting*, 311 F. 2d 191 (4th Cir. 1962), cert. denied 372 U. S. 935 (1963) 9, 36

Ex parte United States, 287 U. S. 241 (1932) 15, 31

Vannata v. *United States*, 289 F. 424 (2d Cir. 1923) .. 61

Ventresca v. *United States*, 380 U. S. 102 (1965) 13

Wood v. *Georgia*, 370 U. S. 375 (1962) 16

STATUTES AND RULES

Title 18 United States Code—

Section 2 60

Section 201 ..... 2, 60

Section 201(b) 2, 10

Section 201(f) 2, 10, 60

Section 3500 .....3, 8, 33

Fed. Rule of Cr. Proc., Rule 6(e) 29

Fed. Rule of Cr. Proc., Rule 41(e) 25

N. Y. Code Crim. Proc. § 249 26

Article 1, Section 6, N. Y. State Constitution 26

MISCELLANEOUS

PAGE

4 Blackstone, Commentaries (Am. ed. 1858) 15

Charge to Grand Jury, 30 Fed. Cas. No. 18,255 (CCD Cal. 1872) 16

Charge to Grand Jury, 30 Fed. Cas. No. 18,272 (CCSD Ohio 1861) 16

Davis, Precedents of Indictments (1831) 15

23 & 24 Geo. 5, C. 36, 5 Halsbury's Statutes of England (2d ed., 1948) pages 1065-1073 28

The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961) 16

The Jencks Legislation: Problems in Prospect, 67 Yale Law Journal 674 (1958) 36

Johnson, Charge to Grand Jury 4 F.R.D. 243 (1945) 15

Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 381 (1955) 15

Morse, A Survey of the Grand Jury System 10 Ore. L. Rev. 101 (1931) 28

Orfield, Criminal Procedure from Arrest to Appeal (1947) 16

Williams, General Instructions and Charge to the Grand Jury 9 F.R.D. 649 (1950) 15

1 Wigmore, Evidence (3d ed. 1940) 15, 26

3 Wigmore, Evidence (3d ed. 1940) 36

Note 38 Yale Law Journal 680 (1929) 29

Note 72 Yale Law Journal 590 (1963) 12, 32

APPENDIX

Title 18 U.S.C. § 210(f) 3, 49, 50, 60

Title 18 U.S.C. § 201(b) 3, 49, 50

Title 26 U.S.C. § 7214(a)(2) 3, 10, 49, 57, 58, 60, 61

Title 18 U.S.C. § 3500 ..... 3, 8

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 138-147) is reported at 368 F. 2d 725.

Jurisdiction

The judgment of the Court of Appeals was entered on October 27, 1966 (R. 148). Petitioner's application for a rehearing (R. 149) was denied on November 15, 1966 (R. 157). On November 28, 1966 by order of Mr. Justice Harlan, the time within which to file a petition for a writ

of certiorari was extended to and including January 14, 1967 (R. 158). The petition was filed on January 12, 1967 and was granted on February 27, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a Government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.

2. Whether written statements of Government witnesses in which they admit prior criminal acts involving moral turpitude should have been made available to the defense under the Jencks Act when the witnesses testified on direct that they "cooperated" with the Government and had been named as defendants in other cases involving the crimes which the witnesses admitted in their statements.

3. Whether title 18 U.S.C. § 201(f) which prohibits a person from giving money to a public official "for the proper discharge of official duty" is inconsistent with title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly".

4. Whether petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.

Applicable Constitutional and Statutory Provisions

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *"

The pertinent text of Title 18 U.S.C. § 201 (as effective until January 20, 1963), 18 U.S.C. § 201(b) and (f) (as effective January 21, 1963), 18 U.S.C. § 2, 26 U.S.C. § 7214 (a)(2) and 18 U.S.C. § 3500 is set forth in the appendix.

Statement

Petitioner, a certified public accountant, was convicted of aiding and abetting Internal Revenue Service agents in receiving illegal fees (26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 2) and of giving money to Internal Revenue Service agents (18 U.S.C. §§ 201[1] and 18 U.S.C. §§ 201(b) and (f)).[2] Three counts of the conviction under 18 U.S.C. § 201(f) were reversed by the Court of Appeals on the ground that they were lesser included offenses of 18 U.S.C. § 201(b).

The Government's case consisted almost entirely of the testimony of the Internal Revenue Service employees who allegedly received money from petitioner. Those employees were named as defendants in this case and, before trial, pleaded guilty to the counts in which they were named but were not sentenced.[3] A brief summary of their testimony follows:

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[1] As effective until January 20, 1963.

[2] As effective since January 21, 1963.

[3] The only Government witnesses who were not defendants were Herbert Vannatta, a technical witness who testified about Internal Revenue Service procedure (R. 27a), and Seymour Levine, a former Internal Revenue Service employee, who purported to corroborate the testimony of the defendant Montello on Count 11 and who had pleaded guilty in another case but, as of the time of trial, had not been sentenced (R. 91a, 97a).

Jeremiah Clyne testified that in about June 1963 petitioner asked him to secure the 1961 tax return of Alphonse and Ethel Jacs (R. 33-34a). Clyne, who audited the return on June 14, 1963 in petitioner's presence, disallowed $700 in deductions after studying substantiation which petitioner produced (R. 36a). On or about July 1, 1963, according to Clyne, after the taxpayers agreed to the disallowance, petitioner gave him about $75 (R. 37a).

Thomas Ellington testified that petitioner represented taxpayers, Leo T. and Catherine C. Higdon in the September 27, 1961 audit of their 1960 tax return (R. 42-43a). At the audit, travel and entertainment expenses of $600 and contributions of $400 were disallowed (R. 45a). Petitioner had substantiation for part of the claimed travel and entertainment expenses and contributions (R. 46a). After the audit, according to Ellington, petitioner left an envelope containing $20 or $25 on his desk (R. 46-47a).

Louis R. Deitsch testified that petitioner was the taxpayers' representative in the audit of the following tax returns conducted on the following dates:

(a) 1959 return of Leo and Catherine Higdon audited on January 11, 1961.

(b) 1959 return of Michael F. and Alice Mahony audited on January 14, 1961.

(c) 1959 return of Seward and Madeline Woodard audited on January 17, 1961.

(d) 1960 return of James B. and Mary Lockhart audited on September 27, 1961.

(e) 1961 return of David and Maizie Rubenstein audited on December 13, 1962.

(f) 1961 return of David T. and Mary T. Warner audited on December 13, 1962 (R. 52-54a).

According to Deitsch, before each audit petitioner asked Deitsch to pull the case from the file and they "could work

something out together on it" (R. 54-55a). In each instance they agreed upon a disallowance (R. 56a). After each taxpayer consented to the disallowance and the audit was concluded, petitioner gave Deitsch an envelope containing $50 for each case (R. 57-58a).

Jeremiah Ryan testified that petitioner represented taxpayers Howard and Olive Shank in the June 20, 1961 audit of their 1960 tax return (R. 65-66a). He said that at the audit petitioner said that if they could make an adjustment on one of the items, perhaps he could give something to Ryan (R. 66a). Travel and entertainment expenses in the amount of $1,100 were disallowed (R. 67a). After the taxpayers consented to the disallowance, according to Ryan, petitioner gave Ryan $50 (R. 68-69a).

Ryan also testified that petitioner represented taxpayers in the October 2, 1963 audit of the 1962 tax return of Arthur and Marguerite Mountrey (R. 69-70a). Travel and entertainment expenses of $400 were disallowed (R. 70a). After audit, according to Ryan, petitioner gave him an envelope containing $50 (R. 71a).

Jeanne Lupesco was introduced to petitioner by Leo Weissberg, her group chief (R. 79-80a). She testified that petitioner represented the taxpayer in the December 1962 audit of the 1961 tax return of Robert and Shirley Jennings (R. 80a). Lupesco disallowed $200 in contributions and $850 in travel and entertainment expenses (R. 83a). At the audit, according to Lupesco, petitioner offered her $75 and after the audit, when the taxpayer had consented to the disallowance, petitioner gave her $75 (R. 82-84a).

Seymour Levine, an Internal Revenue Service employee who was not named in this indictment, and Lawrence Montello who was named, both testified about the audit of the 1961 tax return of Richard and Joanne P. Hurley (R. 94a, 99a). Levine, who was a group chief, testified that petitioner asked him to give the Hurley return to an auditor "who would not be too rough and who could do a quick

audit, not waste too much of his time" (R. 93a). Levine assigned the return to Lawrence Montello, one of the agents in his section (R. 94a). Levine testified that between January 28, 1963, when the return was assigned, and February 4, 1963 when the taxpayers consented to the disallowance, petitioner gave Levine two envelopes containing $50 each (R. 93-95a).

Montello testified that Levine assigned the Hurley return to him, told him it was petitioner's case and said that he would be taken care of (R. 99-101a). Montello testified that between January 28, 1963 and February 4, 1963 Levine gave him $50 (R. 102-03a).

None of the witnesses who testified at trial appeared before the grand jury that indicted petitioner,[4] and the District Court refused to permit petitioner to inspect the Grand Jury minutes to determine what, if any evidence, the Grand Jury heard to support the indictment (R. 106a). The Government, in its brief (p. 24) to the Court of Appeals, admitted that the evidence before the Grand Jury consisted entirely of the testimony of a Government agent who "briefly summarized" "portions" of affidavits which had been executed by the Government witnesses who later testified at the trial.[5] The Government in its brief also

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[4] The witnesses testified before a different grand jury about matters which are not the subject of the indictment in this case. (See R. 49-50a, 106a.) Transcripts of that grand jury testimony were marked as government exhibits for identification as follows:

Clyne	Ex. 105 (R. 39a)	Ryan	Ex. 132 (R. 73a)
Ellington ..	Ex. 113 (R. 48a)	Lupesco ..	Ex. 139 (R. 85a)
Deitsch ...	Ex. 119 (R. 59a)	Levine ...	Ex. 148 (R. 97a)
		Montello ..	Ex. 154 (R. 104a)

[5] The Government's brief in the Court of Appeals (p. 24) states: "The procedure followed before the grand jury was as follows: The Government called as its witness an agent of the Internal Revenue Service who testified that certain auditors (the Government witnesses at trial) had executed affidavits in connection with an investigation relating to Umans. The agent then briefly summarized the portions of the affidavits relating to the illegal payments made by Umans."

admitted that "the availability of the Government witnesses prior to the trial and the indictment was well known to the court, as was their willingness to cooperate in supplying evidence of illegal bribes" (*Ibid.*).

Summary of Argument

1. The evidence before the grand jury to support the indictment consists entirely of the testimony of an Internal Revenue Service agent who summarized portions of affidavits of the witnesses who later testified at petitioner's trial. There is no proof that the agent spoke to any of the witnesses, or knew that the pieces of paper he was summarizing were in fact affidavits of these witnesses. This evidence was insufficient by any reasonable standard to support an indictment and, in effect, petitioner was denied his Fifth Amendment right not to go to trial except upon an indictment of a grand jury.

The function of a grand jury is to determine whether or not there is probable cause to hold a man for trial, *Beavers* v. *Henkel*, 194 U. S. 73, 84 (1904) and to stand as a buffer between the public and the prosecutor to insure that persons will not be required to stand trial on criminal charges unless there are reasonable grounds to support the charge. The evidence before the grand jury in this case was insufficient to establish probable cause to obtain a search or arrest warrant because the testifying agent neither spoke from personal knowledge, nor is there any indication that he had any basis for crediting the hearsay which he summarized. *Jones* v. *United States*, 362 U. S. 257, 269 (1960). Since the evidence was insufficient to establish probable cause for an arrest or search warrant, it also was insufficient to cause petitioner to suffer the much more grave consequences of a public indictment and trial.

If an accused may have an indictment based upon substantial evidence quashed because of bias in a class of

people, *Pierre* v. *Louisiana*, 306 U. S. 354 (1939), then surely he should have the same right if the evidence before the grand jury does not meet an enforceable standard at least as stringent as required for search and arrest warrants.

There is no authority in this Court supporting an indictment based upon the evidence presented to the grand jury in this case. *Costello* v. *United States*, 350 U. S. 359 (1956), the last case decided by this Court involving sufficiency of evidence before the grand jury, is distinguishable because there the grand jury heard the testimony of Government agents with hearsay knowledge who summarized facts given by 144 witnesses and subsequently testified at trial, repeating much the same information which they gave to the grand jury with preliminary testimony laying the foundation for it. In the instant case, there was no way to qualify the double hearsay summary which was presented to the grand jury. Nor was there the same practical reason for analyzing testimony which existed in *Costello*, namely to avoid calling to the grand jury a large number of witnesses whose testimony would have to be summarized to make it meaningful in any event.

Since this Court's opinion in *Costello*, prosecutors have been presenting less and less evidence to grand juries until, as shown by this case, the presentation of evidence has become a matter of form rather than substance. The only way to make meaningful a person's constitutional right not to be tried except upon the indictment of a grand jury is to adopt a standard of evidence enforceable by the accused compelling prosecutors, at the risk of having indictments quashed, to present evidence to the grand jury which meets the test of probable cause.

2. It was prejudicial error for the trial court to refuse to permit petitioner under the Jencks Act, 18 U.S.C. § 3500, to inspect certain statements of Government witnesses because (a) the statements withheld from peti-

tioner relate to the credibility of the witnesses and therefore relate to their direct testimony within the meaning of the Jencks Act, and (b) the direct testimony of the witnesses in part relates to payments received by them from persons other than petitioner and their statements, admitting receipt of money from persons other than petitioner, relate to that part of their direct testimony.

The statements in issue are statements in which the witnesses, all of whom were Internal Revenue Service employees, admitted that they took bribes from various accountants other than petitioner. The fact that the witnesses took bribes is relevant to impeach their credibility. *United States* v. *Whiting*, 311 F. 2d 191 (4th Cir. 1962), cert. denied 372 U. S. 935 (1963). Any statement which relates to the credibility of a witness relates to the subject matter of his testimony within the meaning of the Jencks Act, and therefore such statements should be turned over to the defense. *Rosenberg* v. *United States*, 360 U. S. 367 (1959).

In addition, three of the witnesses were asked on direct examination whether or not they had been named as defendants in indictments other than the one before the court. Each of them admitted that they had been so named. Those indictments involve payments received by the witnesses from persons other than petitioner, which is precisely the subject matter of the statements in issue.

Petitioner was prejudiced by not having these statements available to him because (a) two of the seven witnesses who testified that they received money from petitioner were asked no questions on cross-examination about other crimes they committed and they would have been questioned on the subject had the statements been available, and (b) the remaining witnesses were vague in their testimony about other crimes but, we believe, much more precise in the statements which they gave the Government, giving rise to the inference, unavailable to petitioner because he did

not have the statements, that the witnesses were overzealous in their cooperation with the government testifying about events which in fact they could not remember.

3. Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) and on the identical facts for violations of Title 18 U.S.C. § 201(b). Those counts are mutually exclusive because § 201(f) prohibits the payment of money otherwise than provided by law "for the proper discharge of official duty" and § 201(b) prohibits the payment of money to public officials "corruptly" and "with intent to influence any official act. . . ." Thus, the jury was permitted to find inconsistent facts on the same evidence. The charge of the court continued the error and within the framework of the charge the jury was permitted to find inconsistent facts upon the same evidence. Such a verdict should not be upheld because it would be pure speculation for the Court to decide on which if any of the counts petitioner would have been convicted had the jury been properly charged.

4. Petitioner was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which prohibits Government officials from accepting money otherwise than as prescribed by law for the performance of their duties. Since petitioner allegedly was the payer of the bribe and the crime requires the acts of two people, namely the payer of the bribe and the receiver of the bribe, petitioner may not be convicted of aiding and abetting the receipt of a bribe. This statute, which among other things, provides as a penalty the loss of office, was never intended to encompass a private accountant such as petitioner who did not hold any office. Since it is impossible to commit the substantive offense without cooperative action, it was improper to convict petitioner for aiding and abetting the receipt of the alleged bribe.

ARGUMENT

POINT I

A government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.

The Government has conceded[6] and the Court of Appeals has found that "the indictment was based upon testimony of an Internal Revenue agent who summarized for the grand jury the contents of various affidavits of the witnesses who later testified at appellant's trial" (R. 145).[7] The Government's brief (p. 24) to the Court of Appeals said that "portions" of affidavits had been summarized. There is no proof in the record that the agent corroborated any of the allegations contained in the affidavits, or spoke to the witnesses to assess their credibility, or even knew whether or not the pieces of paper he was summarizing were in fact affidavits of witnesses. On this record, the agent may have merely summarized portions of pieces of paper which someone told him were affidavits of persons who allegedly received money from petitioner.

The Court of Appeals in this case, while holding that the evidence was sufficient to support the indictment, recognized that:

> "excessive use of hearsay in the presentation of Government cases to grand juries tends to destroy the his-

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[6] In *Mesarosh* v. *United States*, 352 U. S. 1, 3 (1956), this Court based its decision entirely upon representations of the Government.

[7] The Court of Appeals in discussing this point states that the witnesses' affidavits, portions of which were summarized for the grand jury, were furnished to petitioner (R. 145). While affidavits and portions of affidavits of the witnesses were submitted to petitioner, there is no evidence in the record that they were the same affidavits summarized to the grand jury. In any event, the point is irrelevant to this argument because if the evidence before the grand jury is insufficient, the error is not cured by permitting petitioner to inspect the basis for the insufficient evidence.

torical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford the innocent. Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." (R. 146)

The issue is whether or not the agent's brief summary of portions of affidavits is sufficient, by standards which now exist or should exist to support an indictment. "Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance." *United States v. Johnson*, 319 U. S. 503, 507 (1943).

We urge that the indictment be quashed because (1) an indictment should be supported by substantial evidence which rationally tends to prove the facts, and the grand jury must have, but did not have in this case, at least the same evidence which would support probable cause for an arrest or search, and (2) ideally, the grand jury should have sufficient evidence, excluding all incompetent evidence, to prove a *prima facie* case against the accused at trial. The second suggested standard, considerably higher than the first and not necessary to a holding in this case, would more likely lead to an assessment of whether or not there is a likelihood of conviction (rather than guilt) which logically should be the function of the grand jury. See Note, Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings, 72 Yale Law Journal 590, 592 (1963). Since the second standard is not necessary to a holding here, we will devote the major portion of our discussion on this point to the first standard.

In seeking an order quashing the indictment, we rely on petitioner's Fifth Amendment right not to be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." If the relief we are seeking does not reach constitutional dimensions, we alternatively ask this Court, in the exercise of its supervisory jurisdiction over lower federal courts, to formulate a standard of evidence designed to avoid indictments based upon insubstantial evidence. *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956); *McNabb* v. *United States*, 318 U. S. 332, 340-41 (1943).

As we shall show below, the function of the grand jury is to determine whether or not there is "probable cause" to hold a man for trial. The evidence in this case would have been insufficient to establish probable cause to obtain a search or arrest warrant because the testifying agent neither spoke from personal knowledge nor is there any indication that he had any basis for crediting the hearsay which he summarized. *Jones* v. *United States*, 362 U. S. 257, 269 (1960); *Aguilar* v. *Texas*, 378 U. S. 108, 114-15 (1964); *Ventresca* v. *United States*, 380 U. S. 102, 110 (1965). Since the evidence was insufficient to establish probable cause for an arrest or search warrant, it also was insufficient to cause petitioner to suffer the much more grave consequences of a public criminal indictment and trial.

The most recent case in this Court discussing the evidentiary requirements to support an indictment is *Costello* v. *United States*, 350 U. S. 359 (1956)[8], in which an in-

[8] *Lawn* v. *United States*, 355 U. S. 339, 350 (1958) was decided after *Costello*, but there the Court found that petitioner had made an insufficient showing that the grand jury had based its indictment upon illegally obtained evidence and indicated that even if he had, the indictment was sufficient. The question of whether an indictment based upon illegally obtained evidence, which is admittedly rationally persuasive, is far different from the question of whether or not an indictment which does not meet the standard of probable cause is sufficient.

dictment was sustained against a claim of evidentiary insufficiency. There, while the evidence before the grand jury was hearsay, it was substantial evidence which rationally tended to prove the facts and that distinguishes *Costello* from the instant case. *Costello* was a complex income tax case in which the witnesses before the grand jury were Government agents with hearsay knowledge who summarized facts given by 144 witnesses and subsequently testified at trial, repeating much of the same information which they gave to the grand jury. "At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained". 350 U. S. at 365. (Concurring opinion.)

In the instant case, a Government agent briefly summarized portions of relatively simple affidavits of witnesses who later testified at trial. There was no way to qualify this double hearsay at trial, nor was there the same practical reason for analyzing testimony which existed in *Costello*, namely, to avoid summoning to the grand jury 144 witnesses whose testimony would have to be analyzed to make it meaningful in any event. Indeed, in the instant case, while the Court of Appeals cautioned that hearsay should only be used when direct testimony is unavailable, or when it is demonstrably inconvenient to summon witnesses with personal knowledge (R. 146), the evidence shows that each of the witnesses did in fact testify before a different grand jury on matters unrelated to this case (see fn. 4, *supra* at p. 6) and the Government admitted in its brief to the Court of Appeals (p. 24) that the witnesses were readily available before trial.

We believe that consistent with the facts and holding of *Costello*, the indictment here should be quashed because the grand jury had no probable cause, or to put it another way, had "no substantial or rationally persuasive evidence which tended to prove the facts." *Costello* v. *United States*, *supra*, at 364 (concurring opinion). To the extent

that a holding in this case quashing the indictment would be inconsistent with the broad dicta of *Costello*, not necessary for the holding in that case, we urge the Court to reconsider that language and formulate an enforceable evidentiary standard which would require indictments to be based upon substantial rationally persuasive evidence or probable cause. The applicable authorities before and after *Costello*, which we shall discuss below, show how the law has developed to a point where today *Costello* is being interpreted so broadly by some courts that the accused, as shown by the indictment in this case, is effectively denied his Fifth Amendment right to be indicted by a grand jury.

Historically, it always has been recognized that the function of a grand jury is to determine whether or not there is "probable cause" to hold a man for trial. See *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958); *Hurtado* v. *California*, 110 U. S. 516, 552 (1884) (dissenting opinion); *Hale* v. *Henkel*, 201 U. S. 43, 64 (1906); *Beavers* v. *Henkel*, 194 U. S. 73, 84 (1904); *Ex parte Bain*, 121 U. S. 1, 11-12 (1887). See also, *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 599 (1950); *Ex parte United States*, 287 U. S. 241, 250 (1932); 1 Wigmore, Evidence (3d ed.) p. 21; 4 Blackstone Commentaries 303 (Am. ed. 1858) ("sufficient cause").[9] "The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers* v. *Henkel*, *supra*, at 84. The purpose of a grand jury investigation is to protect the accused against unfounded or malicious prosecutions by providing that criminal proceedings will not be undertaken without a prior disinterested determi-

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[9] See Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 331, 335 (1955); Davis, Precedents of Indictments, 24 (1831); Williams, General Instructions and Charge to the Grand Jury, 9 F.R.D. 649, 650 (1950); Johnson, Charge to Grand Jury, 4 F.R.D. 243, 249 (1945).

nation of probable guilt. See, *Hale* v. *Henkel, supra,* at 59; *United States* v. *Wells,* 163 F. 313, 324 (D.C.D. Idaho 1908); *Beck* v. *Washington,* 369 U. S. 541, 582 (1962) (dissenting opinion); Charge to Grand Jury 30 Fed. Cas. 992, 993, No. 18,255 (CCD Cal. 1872); Charge to Grand Jury, 30 Fed. Cas. 1036, 1038, No. 18,272 (CCSD Ohio 1861); Orfield, Criminal Procedure from Arrest to Appeal 144 (1947).

In *Wood* v. *Georgia,* 370 U. S. 375, 390 (1962), this Court said:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused whether the latter be an individual minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.'"[10]

It would follow logically that similar to arrest and search cases, which are analogous because of the necessity of a finding of probable cause, a standard of evidence in grand jury proceedings would have been developed over the years and that indictments would have been dismissed if the supporting evidence fell below that standard. It is anomalous that a person may be arrested only on probable cause but must suffer the expense and the public humiliation of a criminal trial on something less than probable cause. "A wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased." *In re Fried,* 161 F. 2d 453, 458 (2d Cir.), cert. dismissed, 332 U. S. 807 (1947).

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[10] See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961).

However, the controversy in the cases until *Costello* was not whether the evidence before the grand jury was substantial or convincing, but whether the evidence was technically "competent" meaning whether or not the evidence would have been admissible at trial. See, for example, *Brady* v. *United States*, 24 F. 2d 405 (8th Cir. 1928). For that reason *Costello* was decided in terms of whether or not the evidence before the grand jury was "competent." It is far more rational to focus, not on whether some technically competent evidence was before the grand jury, but on the question of whether the indictment was returned subsantially upon evidence which was untrustworthy. Indeed, in its brief to this Court (p. 2, fn. 2), in *Costello*, the government suggested it might have been a sufficient answer to petitioner's complaint in that case to say that "the grand jury acted responsibly, on a basis which reasonable men could reasonably deem sufficient to warrant indictment." It does not follow that "incompetent" evidence is unconvincing as Judge Learned Hand noted in the Court of Appeals opinion in *Costello* which said:

> "[Exclusionary rules] apply to evidence that is relevant rationally, but that courts will not accept, not because it does not prove the issue, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth." 221 F. 2d at 677.

Until *Costello*, as the Court of Appeals in that case noted, there was no decision of this Court dealing directly with the issue of whether an indictment must be quashed because all of the evidence before the grand jury was incompetent. 221 F. 2d at 679. In 1910, however, this Court in *Holt* v. *United States*, 218 U. S. 245, considered the question of whether or not an indictment should be quashed when the evidence before the grand jury consisted of (a) admissions of the accused "obtained under circumstances that made them incompetent . . ." and (b) "very little"

other evidence. In an opinion by Mr. Justice Holmes, the Court, "without considering how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted, and how far, in case of such an inquiry, the discretion of the trial court is subject to review", held that "there is no reason for reviewing it here." 218 U. S. at 247. The Court said that an indictment is sufficient where evidence before the grand jury "in its nature competent, but made incompetent by circumstances, had been considered along with the rest." *Ibid.*

Federal cases following *Holt* held that an indictment is sufficient when the grand jury hears some competent evidence. See, e.g., *United States* v. *Nunan*, 236 F. 2d 576, 594 (2d Cir. 1956), cert. denied 353 U. S. 912 (1957); *United States* v. *Holmes*, 168 F. 2d 888 (3d Cir. 1948); *Gates* v. *United States*, 122 F. 2d 571, 576 (10th Cir. 1941), cert. denied 314 U. S. 698 (1942); *Tinkoff* v. *United States*, 86 F. 2d 868, 877 (7th Cir. 1937); *Czarlinsky* v. *United States*, 54 F. 2d 889, 892 (10th Cir. 1931), cert. denied 285 U. S. 549 (1932); *Olmstead* v. *United States*, 19 F. 2d 842, 845 (9th Cir. 1927), aff'd without consideration of the point, 277 U. S. 438 (1928); *Murdick* v. *United States*, 15 F. 2d 965, 968 (8th Cir. 1926), cert. denied sub. nom. *Clarey* v. *United States*, 274 U. S. 752 (1927); *Arnstein* v. *United States*, 296 Fed. 946, 948 (D. C. Cir. 1924); *Livezey* v. *United States*, 279 Fed. 496 (5th Cir. 1922); *Anderson* v. *United States*, 273 Fed. 20 (8th Cir. 1921); *McKinney* v. *United States*, 199 Fed. 25 (8th Cir. 1912); *Hillman* v. *United States*, 192 Fed. 264 (9th Cir. 1911). Dicta in some cases suggested the possibility of a holding that an indictment should be dismissed when all the evidence before the grand jury was incompetent. See *Olmstead* v. *United States, supra*; *Murdick* v. *United States, supra*; *Cooper* v. *United States*, 247 Fed. 45, 47 (4th Cir. 1917); *Czarlinsky* v. *United States, supra*; *Gates* v. *United States, supra*; *United States* v. *Holmes, supra*; *United States ex rel.*

Potts v. *Rabb*, 141 F. 2d 45, 47 (3d Cir.), cert. denied 322 U. S. 727 (1944); *Friscia* v. *United States*, 63 F. 2d 977, 980 (5th Cir.), cert. denied 289 U. S. 762 (1933). The 8th Circuit adopted such a rule. *Nanfito* v. *United States*, 20 F. 2d 376 (8th Cir. 1927); *Brady* v. *United States*, *supra*. On the other hand, dicta in other cases suggested the contrary, that an indictment is valid when all the evidence before the grand jury is incompetent. See *United States* v. *Beadon*, 49 F. 2d 164 (2d Cir.), cert. denied 284 U. S. 625 (1931), and cases cited therein. This was the somewhat confused background against which this Court decided *Costello* in 1955.

In *Costello* the question presented to the Court by petitioner and the question on which this Court granted certiorari was "May a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?" 350 U. S. at 359. This Court answered the question in the affirmative.

However, it is important to distinguish the holding of *Costello* from its broad dicta which, coupled with the absence of any enforceable standard, has been interpreted differently by different courts resulting in confusion. The *Costello* dicta has also led prosecutors to present less and less evidence to grand juries until, as shown by this case, the presentation of evidence becomes a matter of form rather than substance.

Confusion has resulted because at times courts, in sweeping language, have refused to permit examination of the grand jury minutes on the ground that *Costello* precludes inquiry into the sufficiency of evidence before the grand jury and therefore an inspection of the minutes would be academic. *United States* v. *Ramsey*, 315 F. 2d 199 (2d Cir.), cert. denied 375 U. S. 883 (1963); *United States* v. *Aviles*, 274 F. 2d 179, 190-91 (2d Cir.), cert. denied 362 U. S. 974 (1960); *United States* v. *Cimino*, 321 F.

2d 509, 512 (2d Cir. 1963), cert. denied 375 U. S. 974 (1964); *United States* v. *Tolub*, 187 F. Supp. 705 (S.D.N.Y. 1960). See also *United States* v. *Labate*, 270 F. 2d 122 (3d Cir.), cert. denied 361 U. S. 900 (1959). At other times courts have inspected the minutes in camera, *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 37 (8th Cir.), cert. denied 373 U. S. 904 (1963); *United States* v. *Lennon*, 148 F. Supp. 492, affirmed 246 F. 2d 24 (2d Cir.), cert. denied 355 U. S. 836 (1957); *United States* v. *Tane*, 29 F.R.D. 131 (E.D.N.Y. 1962), or have permitted inspection by the defendant, *Coppege* v. *United States*, 311 F. 2d 128 (D. C. Cir. 1962), cert. denied 373 U. S. 946 (1963), thereby recognizing that if the evidence did not meet some federal standard the indictment should be dismissed.

The different interpretations of *Costello* have apparently resulted from the difference in approach between the majority and concurring opinions in that case. The holding of *Costello* is simply that hearsay evidence alone will support an indictment. The majority opinion goes further, however, and indicates that the only grounds for quashing are, 1) an indictment invalid on its face, 2) an illegally constituted grand jury, and, 3) a prejudiced or biased grand jury. If this language is taken literally, it would seem to mean that an indictment is not subject to challenge even if the grand jury had before it no rationally persuasive evidence, or indeed, no evidence at all.

It is on this point that Mr. Justice Burton, who concurred, disagreed. An indictment based on no evidence whatsoever is difficult to imagine, and it has been indicated that such an indictment should be quashed. *Duarte* v. *United States*, 171 F. 2d 971 (5th Cir. 1949); *Cox* v. *Vaught*, 52 F. 2d 562 (10th Cir. 1931); *Brady* v. *United States*, *supra*. We have found no case involving no evidence at all, but if the accused has no remedy to insure against an indictment based upon no evidence, then his right to go to trial except upon an indictment is nothing more than an empty phrase.

An accused is constitutionally entitled to indictment by a non-biased grand jury, and may enforce that right by having an indictment quashed if he can show that the grand jury was biased against him. See, *Costello* v. *United States, supra; Lawn* v. *United States, supra; Pierre* v. *Louisiana,* 306 U. S. 354 (1939); *Cassel* v. *Texas,* 339 U. S. 282 (1950). If an accused may have an indictment based upon substantial evidence quashed because a class of people was excluded from grand jury service, *Pierre* v. *Louisiana, supra,* then surely he should have the same right if the grand jury evidence does not meet a standard of evidence designed to insure against frivolous or maliciously motivated indictments.

In *Costello,* Mr. Justice Burton sought to define a standard and thereby to limit the broad language of the majority opinion by affirming the view which Judge Hand had expressed in the 2d Circuit Opinion:[11]

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U. S. at 364.

As noted above, the *Costello* dicta, not only resulted in what appears to be conflicting interpretations, it has also motivated prosecutors to seek and obtain indictments based upon the scantiest evidence as shown by the indictment in this and other cases cited below. A decision of this Court approving the evidentiary standard of this case will, of

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[11] Judge Hand's statement appears in 221 F. 2d at 677.

course, result in future indictments based upon the "bare-bones" formula which the Government used here.

Since this Court's opinion in *Costello*, the Government, relying upon a broad interpretation[12] has developed a pattern of consciously attempting to avoid having witnesses with personal knowledge testify before grand juries. At times, the Government, instead of having someone with personal knowledge testify before the grand jury, has a Government agent who interviews that person testify. *United States* v. *Borelli*, 336 F. 2d 376, 391 (2d Cir. 1964), cert. denied *sub. nom Mogavero* v. *United States*, 379 U. S. 960 (1965). For other cases in which the government substituted an agent with hearsay testimony for witnesses with personal knowledge see *United States* v. *Cimino*, 321 F. 2d 509, 512 (2d Cir. 1963), cert. denied 375 U. S. 974 (1964); *United States* v. *Payton*, 363 F. 2d 996 (2d Cir.), cert. denied 385 U. S. 993 (1966); *United States* v. *Andrews*, No. 30763, 2d Cir., Aug. 9, 1967; *United States* v. *Daly*, 65 Cr. 312, E.D.N.Y., April 28, 1967. At least in those cases, in the course of the interview, or in the course of the investigation, the agent has an opportunity to assess and later vouch for the credibility of the person he interviews or to corroborate, on personal knowledge, some of the underlying facts. Whether or not the grand jury testimony in those cases is sufficient to rationally establish the facts is not the issue here because in the present case the evidence before the grand jury was not a summary of an agent's interview with a witness with personal knowledge. The testimony consisted entirely of an agent's brief summary of portions of affidavits of witnesses.

The Government's reason which has been called a "transparently unworthy one" *United States* v. *Payton*, *supra*, at 1,000 (dissenting opinion), for adopting this pro-

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[12] In *United States* v. *Laughlin*, 226 F. Supp. 112 (D.C.D.C. 1964) the Court characterized the Government's interpretation of *Costello* as "extreme".

cedure, is significant because it shows that this is no isolated case, but part of a planned policy designed to obviate the necessity of making grand jury testimony available to defense counsel. It is a policy which, if upheld, will continue and will make a mockery of the right not to be prosecuted except upon a grand jury indictment. Indeed, even judicial criticism of this procedure has not motivated the government to present other evidence to the grand jury. Thus, in the recent case of *United States* v. *Andrews*, No. 30763, 2d Cir., August 9, 1967, The Second Circuit, citing the instant case and *United States* v. *Payton*, *supra*, said "The presentation of hearsay testimony before the grand jury is clearly permissible, and indictments based thereon are valid indictments under the rule of *Costello* v. *United States*, 350 U. S. 359 (1956), even though recently the practice has been subjected to judicial criticism in this circuit."

The procedure adopted in this case was designed to avoid the holding of the Court of Appeals for the Second Circuit in *United States* v. *Borelli*, *supra*, that portions of the grand jury testimony of an agent who summarizes his interviews with a witness who later testifies at trial must be made avaliable to the defense where there are inconsistencies between the grand jury and trial testimony. In the instant case the testimony is one step removed from that in *Borelli* and the Government successfully argued that the grand jury testimony should not be made available to the defense (R. 106a). While the Government's motivation may ordinarily be unimportant it is relevant here because it shows that unless halted by this Court, the procedure adopted in this case, which results in "shoddy merchandise" being presented to grand juries, *United States* v. *Payton*, *supra* (dissenting opinion), will continue and will become the rule rather than the exception if indeed it is not already the rule. The question of how far the Government should be permitted to go in presenting evidence to a grand jury which, because of its remoteness to

any personal dealings with a prospective defendant becomes more and more unreliable, touches innumerable cases and vitally affects the Fifth Amednment right not to be accused of a crime except upon a grand jury indictment.

The evidence used in this case, insufficient to support a search or arrest warrant, also was insufficient, based upon the above authorities, logic and policy, to support an indictment. However, it has been urged that assuming the benefits of a standard of evidence, there are countervailing policy reasons to prohibit the accused from attacking indictments based upon evidentiary insufficiency. The short answer to each of those arguments is that without an enforceable standard the accused has a right without a remedy and the grand jury, if it is not already, will inevitably become a "rubber stamp" for the prosecutor. Cf. *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964). "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U. S. 212, 218 (1960). We will now examine the arguments against permitting the evidence before grand juries to be analyzed for sufficiency.

a. Delay and administrative hardship caused by preliminary hearings to determine the sufficiency of the evidence is no reason to deny to the accused his constitutional right to be indicted by a grand jury.

This Court in *Costello* said that if indictments were held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the delay would be great, culminating in preliminary trials to determine the competency and adequacy of the evidence before the grand jury. See also, *Holt* v. *United States*, *supra*, at 248; *United States* v. *Morse*, 292 F. 273, 278 (S.D.N.Y. 1922). While that argument may have validity in the context of *Costello* where the question before the Court was

whether or not an indictment based upon substantial evidence which happened to be hearsay was sufficient, the argument surely has no force when considering an indictment based upon insubstantial evidence. We are considering the protection of a right guaranteed by the Constitution, and administrative problems in enforcing that right should not be a reason for the promulgation of a rule which would effectively eliminate that right. Furthermore, an enforceable rule requiring grand juries to indict only upon probable cause, meaning substantial rationally persuasive evidence, has the benefit of being administratively feasible and at the same time reasonably secures the protection of the Fifth Amendment to the accused.

Experience with the enforcement of other constitutional rights and the experience of those states which do permit inquiry into the sufficiency of the evidence teaches that this alleged administrative problem is not realistic. Thus, for example, the federal courts have not been overwhelmed with administrative difficulty in holding hearings to determine whether or not there is probable cause for an arrest or a search, the facts and circumstances surrounding a confession, and whether or not evidence was seized illegally. See, for example, *Battle* v. *United States*, 345 F. 2d 438 (C.A.D.C. 1965); *Austin* v. *United States*, 297 F. 2d 356 (4th Cir. 1961); *Nardone* v. *United States*, 308 U. S. 338 (1939); Fed. Rules of Cr. Proc., Rule 41(e). This Court in zealously protecting the rights of persons to be free from arrests and searches except upon probable cause has not been deterred from enforcing those rights because inevitably litigation is generated over these issues. Similarly, we believe that the argument that additional litigation will result through the enforcement of this right, should be rejected. Indeed, the experience in the State of New York where the standard of evidence before the grand jury is quantitatively and qualitatively higher than the one we are seeking in this case, shows that the danger of a flood of unmanageable litigation is illusory. We refer briefly

to the procedure in that state merely to show that practical rules may be developed in this area which would protect the rights of the defendant without being burdensome.

By interpretation of the New York Constitution, *People v. Glen*, 173 N. Y. 395, 400 (1903), which has substantially the same language as the federal constitution[11] and by statute, N. Y. Code Crim. Proc. § 249, a Grand Jury may receive none but legal evidence, and an accused may compel that standard by moving to dismiss an indictment, *People* v. *Nitzberg*, 289 N. Y. 523 (1943); *People* v. *Sweeney*, 213 N. Y. 37 (1914).[12] When a claim of insufficiency of evidence before the Grand Jury is made, the Court first determines whether or not the defendant has supplied extrinsic proof that there is "evidentiary insufficiency." *People* v. *Howell*, 3 A. D. 2d 153, 158 N.Y.S. 2d 985, 987 (1st Dept. 1957), aff'd 3 N. Y. 2d 672 (1958). If there is no extrinsic proof, the inquiry terminates, *People* v. *Pryor*, 11 N.Y.S. 2d 393, aff'd 283 N. Y. 623 (1940), and this, in and of itself, will have a natural tendency to limit litigation. If, however, there is extrinsic proof of evidentiary insufficiency, then the Court inspects the Grand Jury minutes in camera and dismisses the indictment on its own motion if the evidentiary standard has not been met, *People* v. *Hirschberg*, 37 N.Y.S. 2d 861 (1942); *People* v. *Valerino*, 54 N.Y.S. 2d 521 (1945), or permits the defendant to inspect the minutes and brief and argue the point in those cases where the in camera inspection of Grand Jury minutes shows that the point is fairly arguable. See *People* v.

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[11] Article 1, section 6 of the New York State Constitution provides that, "No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury. . . ."

[12] Statutes in other states require that only legal evidence be admitted before the grand jury. Under certain of the statutes, either because of the language of the statutes or by judicial interpretation, defendants have been refused the right to have indictments quashed on the ground that there is insufficient evidence before the grand jury. The citations to the statutes appear in 1 Wigmore, Evidence (3d ed. 1940) 23 fn. 8.

Mitchell, 140 Misc. 869, 251 N.Y.S. 716 (1931); *People* v. *Barnes*, 197 Misc. 477, 98 N.Y.S. 2d 481 (1950); *People* v. *Gentile*, 20 A. D. 2d 412, 247 N.Y.S. 2d 551 (1st Dept. 1964).

A similar standard in the federal courts would insure that persons are indicted only upon reliable evidence without forcing prosecutors to produce their entire case before the grand jury. Courts would review the grand jury evidence only when the accused has made a satisfactory showing that the grand jury received relatively large quantities of evidence excludable for want of reliability. This practice would minimize the real possibility of harm to the accused without entailing a significant increase in the workload of the courts, thereby insuring to the accused the enforcement of his Fifth Amendment right without causing prohibitive administrative difficulties.

b. Historical reasons.

It has been argued that our grand jury was intended to operate like its English progenitor unhampered by procedural or evidential rules and that grand jurors could even act on their own knowledge. *United States* v. *Costello*, *supra* at page 362. However, even historically, as the Government recognized in its brief to this Court in *Costello* (Gov't. Brief, p. 22), there was a "readily understandable reluctance on the part of at least some judges to send affidavits to a grand jury as a substitute for live witnesses". See *Reg.* v. *Gerrans*, 13 Cox 158 (1876); *Reg.* v. *Bullard*, 12 Cox 353 (1872). In this case, as a substitute for live witnesses, the Government, instead of sending affidavits to the grand jury, sent something less, to wit, a summary of affidavits.

In any event, no matter what rule existed historically, we suggest that in the light of modern day experience some enforceable evidentiary standard is necessary. If there ever was a valid reason for permitting a grand jury to indict based upon its own knowledge that reason surely does not exist today, especially in our large complex urban

societies in which it is only by the most remote coincidence that any member of the grand jury has any independent knowledge of the investigation being conducted. Experience shows that grand jurors alone cannot be relied upon to protect the rights of the accused by requiring the prosecutor to present substantial evidence before an indictment is returned. In modern times grand juries, ever ready to indict based upon evidence such as that presented in this case, are becoming nothing more than investigatory tools of the prosecutor rather than a buffer between the prosecutor and the prospective accused. If the grand jury system is to be abolished as it has been in England since 1933,[15] it should be by Constitutional amendment, not by fiat of the prosecutor.

If the grand jury is to be more than an ancient relic carried over from English Common Law[16], and if there is to be meaning to the Constitutional requirement that a person shall not be held for a crime unless there is an accusation by a grand jury, then some standard of evidence should exist which an accused may compel the Government to follow. Under the present system an accused, who has a constitutional right not to be tried except upon a grand jury indictment, must rely entirely upon the integrity of the prosecutor and the members of the grand jury not to indict upon evidence which does not rationally establish the facts. There is virtually no way for the accused to protect himself from an indictment based upon unreliable evidence and thus the accused has an illusory right because it is not coupled with any remedy. Whatever reasons may have existed historically for permitted grand juries to indict upon their own knowledge surely do not exist today.

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[15] 23 & 24 Geo. 5, C. 36; 5 Halsbury's Statutes of England (2d ed., 1948) pages 1065-1073.

[16] See generally Morse, A. Survey of the Grand Jury System, 10 Ore. L. Rev. 101, 217, 293 (1931).

c. Grand Jury secrecy.

It has been said that grand jury minutes should not be re-examined because the secrecy of the grand jury proceedings should remain inviolate. See, *United States* v. *Reed*, 27 Fed. Cas. No. 16,134, p. 727, 738 (C.C.N.D. N. Y. 1852). As a corollary it has been urged that exhibiting the minutes in open court would reveal the prosecution's case to the accused, thus facilitating perjury and subornation. See, *Kastel* v. *United States*, 23 F. 2d 156, 158 (2 Cir. 1927), cert. denied 277 U. S. 604 (1928); Note, 38 Yale Law Journal 680 (1929). However, the purpose of the secrecy requirement is to prevent public circulation of accusations prior to commencement of prosecutions. See, *United States* v. *Perlman*, 247 Fed. 158, 160 (2d Cir. 1917). The courts have never strictly enforced the requirement after the indictment has been returned. This policy is recognized and confirmed in Rule 6(e) of the Federal Rules of Criminal Procedure which provides that there may be disclosure of matters occurring before the grand jury under the following circumstances:

> "when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment. . . ."

If in an appropriate case there is a need for secrecy to protect a witness or to preserve the integrity of an existing investigation, the relevant facts may be brought to the attention of the court for a determination of that issue. But, secrecy is no reason to sustain an indictment in this case in which the Government itself has revealed the nature of the evidence before the grand jury, and by so revealing has shown that there was no legitimate government reason for keeping the evidence secret after its sufficiency was attacked.

d. Errors committed by the grand jury may not be purged at the trial.

Another view reflected by the refusal to examine the grand jury proceedings, is that an indictment is "no more than an accusation" *United States* v. *Remington,* 191 F. 2d 246, 252 (2d Cir.), cert. denied 343 U. S. 907 (1952) and the accused is sufficiently protected because errors committed by the grand jury may be purged at the trial rather than by quashing the indictment. See, *Lawn* v. *United States,* 355 U. S. 339, 350 (1958), cf. *United States* v. *Pappagoda,* 288 Fed. 214 (D.C.D. Conn. 1923).

A somewhat related argument was used in *United States* v. *Remington, supra,* in which the Court refused to permit the defendant to examine the grand jury minutes to attempt to document his charge that the grand jury foreman used undue influence motivated by his financial interest in a book being written by the Government's chief witness in the case. The Court, recognizing that if such influence had been proved the indictment would have been dismissed, said that although "some abuses may thus go uncorrected, it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove. . . ." 191 F. 2d at 252.

This attitude is inconsistent with the underlying purposes of the Fifth Amendment. The very essence of the Fifth Amendment is that no one should be put to the expense, and hazards of a trial without a regularly arrived at and disinterested prior determination of probable guilt. The grand jury is a safeguard designed to protect the reputation of the accused, to avert the stigma of prosecution unless there is reasonable ground for proceeding. The present practice ignores these ends when it forces the accused to submit to trial even though the indictment was returned substantially upon untrustworthy evidence.

It should be noted that the argument that a fair trial purges the error before the grand jury has been made

in a dissent in *Cassell* v. *Texas*, 339 U. S. 282, 302 (1950), which said: "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice." But the majority did not agree. Since a grand jury was used to indict, the majority held it to constitutional requirements and we ask this Court to do the same here. See *Beck* v. *Washington, supra*, at 582 (dissenting opinion).

e. The grand jury determination should not conclusively establish probable cause.

It has been said, in a somewhat circular analysis, that it is unnecessary to establish probable cause for an arrest if the arrest comes as a result of an indictment "because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant. . . ." *Giordenello* v. *United States*, 357 U. S. 480, 487 (1958). See, *Ex parte United States*, 287 U. S. 241, 249 (1932).[17] However. when one attempts to determine whether or not there was probable cause for the indictment by any standard, he is blocked by the authority of *Costello*. If a grand jury determination conclusively establishes probable cause and that determination is based upon unreliable evidence then the Fifth Amendment right to be indicted by a grand jury is nothing but a procedural formality.

Thus, the reasons which may be advanced for refusing to go behind indictments to cure admitted violations of the Fifth Amendment rights of the accused are overwhelmingly outweighed by the benefits to be derived in continuing the

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[17] But see *Beavers* v. *Henkel, supra*, at 85, in which this Court, because it was not necessary for a holding in that case, refused to regard the indictment as conclusive evidence of probable cause and said that it "is sufficient for this case to decide, as we do, that the indictment is *prima facie* evidence of the existence of probable cause".

proper function of the grand jury—to serve as a buffer between the prosecutor and the public and to insure that indictments are not returned upon the flimsy evidence used in this case. An enforceable standard of evidence will insure against the practical abolition of the grand jury system.

As noted above (p. 12), while not necessary for a holding in this case, we believe that ideally the function of the grand jury should be to determine whether or not a person is susceptible of being convicted, and that the test to determine the sufficiency of the evidence should be whether or not such evidence has been presented to the grand jury so that "if nothing more were heard at trial, a petty jury could conclude that the prosecution had successfully borne the burden of proof." Note, 72 Yale L. J. 590, 592 (1963). This rule, of course, would place a substantially heavier burden upon the grand jury than is necessary for a holding in this case. The reason for adopting such a rule is because if enough of the evidence heard by the grand jury is excludable under all circumstances so that the remaining evidence would not support a conviction, and there is no other evidence available upon which to base a prosecution, an indictment based upon that evidence cannot result in a conviction and such an indictment is not justified as the commencement of the process leading to a conviction because the conviction will never take place. (*Ibid.*) This rule would not prohibit the prosecutor from presenting incompetent evidence to the grand jury since that evidence would be excluded in determining whether or not there is sufficient evidence to establish a *prima facie* case at trial. We have only briefly stated the above proposed rule because it is not necessary for a holding in this case.

When we put in juxtaposition the arguments advanced in favor of a standard of evidence enforceable by the accused, against the evidence presented to the grand jury in

this case, the reasons for quashing the indictment become compelling. If the Court affirms the conviction below, it will be giving prosecutors a formula, which they will undoubtedly use and stretch even further, for obtaining indictments at their whim. That result will be contrary to the purposes of the grand jury requirement. On the other hand, if the indictment in this case is quashed, then prosecutors will know that the grand jury serves a purpose in preventing indictments based upon insubstantial evidence. In conclusion, we urge that a grand jury should have before it at least such evidence as would establish probable cause for an arrest or search. The grand jury in this case did not have such evidence and we ask that the indictment be quashed.

POINT II

Written statements of Government witnesses in which they admit prior criminal acts involving moral turpitude should have been made available to the defense under the Jencks Act when the witnesses testified on direct that they "cooperated" with the Government and had been named as defendants in other cases involving the crimes which the witnesses admitted in their statements.

The Government witnesses at trial were Internal Revenue Service employees who testified about payments they allegedly received from petitioner. After their direct testimony, the witnesses' written statements in the Government's possession were requested by the defense under the Jencks Act, 28 U.S.C. § 3500, which, among other things, requires the Government to produce upon motion of the defendant, "any statement . . . of the witness . . . which relates to the subject matter as to which the witness has testified." However, at the Government's request, on the theory that they were not related to the direct testimony, the District Court refused to make certain of the state-

ments available.[18] The Court of Appeals, affirming the decision of the District Court, found that the statements "relate to payments received by the government witnesses from persons other than appellant, and the material not furnished to appellant in no way related to him"[19] (R. 146).

We believe that it was prejudicial error for the Court below to refuse to permit petitioner to inspect and utilize the statements because a) the statements withheld from petitioner related to the credibility of the witnesses and therefore related to their direct testimony within the meaning of the Jencks Act, and b) the direct testimony of the witnesses related to payments received by them from per-

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[18] Affidavits and statements of the following witnesses were marked as Government exhibits for identification and sealed by the District Court at the request of Government counsel:

Clyne	Exs. 102, 103 and 104. (Ex. 101, which was furnished to defense counsel, contains excerpts from Ex. 102) (R. 37-38a).
Ellington	Exs. 109, 110 and 112 (Ex. 108, which was furnished to defense counsel, contains excerpts from Ex. 109) (R. 48a).
Deitsch	Exs. 115, 116 and 118 (Ex. 114, which was furnished to defense counsel, contains excerpts from Ex. 115) (R. 58-59a).
Ryan	Exs. 127, 129 and 131 (Ex. 126 which was furnished to defense counsel contains excerpts from Ex. 127) (R. 72-73a).
Lupesco	Exs. 135, 136 and 138 (Ex. 134, which was furnished to defense counsel, contains excerpts from Ex. 135) (R. 84-85a).
Levine	Exs. 141, 144 and 147 (Ex. 143, which was furnished to defense counsel, contains excerpts from Ex. 144) (R. 96-97a).
Montello	Exs. 150, 152 and 153 (Ex. 149, which was furnished to defense counsel, contains excerpts from Ex. 150) (R. 103a).

[19] We urge this Court to review, as did the Court of Appeals, the statements withheld by the trial judge. *Rosenberg* v. *United States*, 360 U. S. 367, 369 (1959).

sons other than petitioner and their statements, admitting receipt of money from persons other than petitioner, were related to their direct testimony.

a. The statements relate to the credibility of the witnesses and therefore should have been turned over to the defense.

Statements which relate to the credibility of a witness relate to the subject matter of his testimony and should be submitted to the defense for use on cross examination. Thus, in *Rosenberg* v. *United States*, 360 U. S. 367 (1959), this Court said that a statement by a witness that she feared her memory was poor as to the events at issue should have been turned over to the defense. In *Ogden* v. *United States*, 303 F. 2d 724, 739 (9th Cir. 1962), the Court said that a statement concerning the clarity of a witness' recollection of the events to which he testified is within the Jencks Act. In *United States* v. *Borelli*, 336 F. 2d 376, 393 (2d Cir. 1964), cert. denied sub. nom. *Mogavero* v. *United States*, 379 U. S. 960 (1965), the Court said that a statement that would support impeachment for bias and interest relates to a witness' direct testimony. In *Borelli* the Court said:

> "We can see no reason why a statement that would support impeachment for bias and interest does not 'relate' to the witness' testimony as much as a statement permitting impeachment for faulty memory, Rosenberg v. United States, 360 U. S. 367, 370, 79 S. Ct. 1231, 3 L. Ed. 2d 1304 (1959). If 'relate' were to be limited to factual narratives, we should have to consider whether a letter merely proffering a witness' services in return for consideration was within the protection which the Jencks Act confers upon the Government; but we think the broader construction preferable and, indeed, necessary." 336 F. 2d at 393.

It has always been recognized that criminal acts involving moral turpitude are revelant to the issue of a witness'

credibility. *United States* v. *Whiting*, 311 F. 2d 191, 196 (4th Cir. 1962), cert. denied 372 U. S. 935 (1963); *Simon* v. *United States*, 123 F. 2d 80, 86 (4th Cir.), cert. denied 314 U. S. 694 (1941); *Montgomery* v. *United States*, 203 F. 2d 887 (5th Cir. 1953). See 3 *Wigmore, Evidence*, § 977 *et seq.* (3d ed. 1940).

In *United States* v. *Masino*, 275 F. 2d 129, 133 (2d Cir. 1960), the Court said:

> "Where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In this case the witnesses, all of whom were Internal Revenue Service employees, admitted, in statements which were unavailable to the defense, that they took bribes from various accountants. These are clearly admissions which relate to the witnesses' credibility and therefore should have been turned over to the defense. Cf. The Jencks Legislation: Problems in Prospect, 67 Yale Law Journal 674, 693-95 (1958).

The Court of Appeals said that the statements were properly withheld because the Government witnesses admitted other bribes on cross examination and questions "calling for details of other instances of bribery, for which the witnesses had been indicted, might properly have been excluded at trial . . ." (R. 146-47). However, whether or not the details of other instances of bribery might have been excluded at trial is not the issue. As explained more fully in (c) below, the statements would have been helpful on cross-examination not only because they reveal other briberies but also because, inconsistently with the testimony of the witnesses, we believe that they record precisely the time, place, amount and payer of the other bribes.

When the witnesses testified, they had a much poorer recollection than we believe is reflected in their statements to the Government sealed by the Court.

We fully recognize that the extent of cross-examination on these matters is within the discretion of the Court. *Foster v. United States*, 282 F. 2d 222, 224 (10th Cir. 1960). We urge, however, that the Court's discretion is irrelevant to this argument. The Court permitted the witnesses to be questioned about the subject matter of other bribes thereby exercising its discretion, to the extent it had discretion, in favor of permitting the inquiry. The point is that the availability of the statements would have aided the defense in this line of inquiry which had been permitted by the Court and without the statements this line of inquiry was not as effective.

We believe that the statements are within the Jencks Act, because they relate to the credibility of the witnesses, and it was prejudicial error to refuse to turn them over to the petitioner.

b. The statements withheld from petitioner relate to that part of the direct testimony of the witnesses about other indictments and cooperation with the Government.

The witnesses Clyne, Deitch and Ryan were asked on direct examination whether or not they had been named as defendants in indictments other than the one before the Court (R. 31a, 51a, 63a). Each of the witnesses admitted that they had been so named (*Ibid.*). The Court may take judicial notice of those indictments, *Freshman* v. *Atkins*, 269 U. S. 121, 124 (1925); *Kaliman* v. *Liberty Mutual Fire Ins. Co.*, 300 F. 2d 547 (2d Cir. 1962),[20] which involve pay-

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[20] The other indictments filed in the District Court against the Government witnesses are as follows:

Clyne, 64 Cr. 688, 689, 690, 692, 1037, 1068, 1069, 65 Cr. 243, 387.

(Footnote continued on following page)

ments received by the witnesses from persons other than petitioner—precisely the subject matter of the statements in issue. The statements made by the witnesses, withheld from petitioner, are obviously admissions of guilt to the charges made in the indictments, and since the witnesses were asked questions about that subject matter on direct examination, the statements relate to the direct testimony and should have been turned over to the defense.

Moreover, the statements withheld from petitioner admitting the receipt of money from persons other than petitioner were given as part of a plan of cooperation by each of the witnesses with the Government and the witnesses were told that their cooperation would be made known to the sentencing judge (R. 31-32a, 41a, 51a, 64a, 79a, 98a). The fact that the witnesses had cooperated fully with the Government was elicited on direct examination and the sealed statements relate to that cooperation.

Thus, the witnesses Clyne, Ellington, Deitch, Ryan, Lupesco and Montello each were asked on direct examination whether or not any promises had been made to them for their cooperation with the Government and they each said that they were told that their cooperation would be made known to the sentencing judge (*Ibid.*). Clyne said on direct that "I have been told that if I cooperate that it would be made known to the sentencing judge" and that to cooperate meant to tell the whole truth (R. 32a). Ellington said on direct that "I was told that I would cooperate by telling everything I knew honestly" (R. 41a). Deitch said on direct that cooperation meant "to tell the truth"

(Footnote continued from preceding page)

Deitch, 64 Cr. 688, 689, 691, 692, 1037, 1068, 1069, 65 Cr. 387.
Ellington, 64 Cr. 689, 692, 1037.
Lupesco, 64 Cr. 684, 689, 691, 692, 1037, 1038, 1065, 1068, 1069.
Montello, 64 Cr. 688, 689, 690, 691, 692, 1037, 1066, 65 Cr. 243, 387.
Ryan, 64 Cr. 687, 688, 691, 692, 1066, 65 Cr. 53, 387.

and answered affirmatively when asked if that meant "the whole truth" (R. 51a). The sealed statements evidencing the witnesses cooperation, elicited on direct examination, were erroneously withheld from the defense because they related to the direct examination.

This Court has not defined the scope of the phrase "relates to the subject matter as to which the witness has testified" as used in the Jencks Act except to say in *Rosenberg* v. *United States*, 360 U. S. 367, 370 (1959), that a statement relating to the credibility of a witness relates to the direct testimony and is within the Act even though the statement does not otherwise touch on the events testified to on direct.

The Senate Report on the bill that became the Jencks Act states:

> "The proposed legislation, as here presented, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified to at the trial . . . S. Rep. No. 981, 85th Cong. 1st Sess."

The Ninth Circuit in *Ogden* v. *United States*, 303 F. 2d 724, 740 (9th Cir. 1962), in a case in which portions of a statement "were relevant to the subject matter of the cross-examination only in the broadest terms", said:

> ". . . the test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to. The problem is not whether a question framed precisely in the terms of the withheld information would relate to the subject matter of the direct examination, but rather whether the withheld material might be useful in framing ques-

tions which would be relevant to that subject matter. The appropriate analogy is found in Rule 16 of the Federal Rules of Criminal Procedure, and the proper inquiry is whether the omitted portions of the statement 'may be material to the preparation' of proper cross-examination. Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefit of counsel's more intimate knowledge of the possible significance of particular information for purposes of impeachment."

In *United States* v. *Cardillo*, 316 F. 2d 606, 615 (2d Cir.), cert. denied 375 U. S. 822 (1963), the Court said "the statement must relate generally to the events and activities testified to."

The withheld statements are within the Jencks Act in the light of its purpose, to make available to the defense prior statements of witnesses which might be helpful in impeaching the testimony of Government witnesses, *Palermo* v. *United States*, 360 U. S. 343, 352 (1959); *United States* v. *Wenzel*, 311 F. 2d 164, 171 (4 Cir. 1962); *United States* v. *Johnson*, 337 F. 2d 180, 202 (4 Cir. 1965), cert. denied sub nom. *Edlin* v. *United States*, 385 U. S. 846 (1966). The Government, had it so elected, could have refrained from asking any questions on direct about the witnesses' cooperation and about the other indictments in which the witnesses were named as defendants. Having elected to elicit this testimony on direct examination, the statements which were in part the "product" of that cooperation, were related to the direct testimony and should have been turned over to the defense.

c. Petitioner was prejudiced by the order refusing him inspection of the witnesses' statements.

The Court of Appeals, as stated above, found that petitioner was not prejudiced by the unavailability of the statements for impeachment purposes because (1) during

the trial petitioner cross-examined the Government witnesses as to their dealings with other persons and "in each instance" the witness admitted accepting money from other taxpayers' representatives, and (2) in any event the details of other instances of bribes for which the witnesses had been indicted might properly have been excluded at trial (R. 146-47). We urge that petitioner was prejudiced by the unavailability of these statements for the following reasons: (1) The Court of Appeals is factually wrong in its statement that "in each instance" the witnesses admitted accepting money from taxpayers' representatives. The fact is that two of the witnesses (Ellington and Levine) were asked no questions on cross-examination about payments received from others and, armed with their prior admissions, their credibility could have been impeached. (2) While much of the testimony of the remaining witnesses was vague with regard to payments received by others, we believe that the statements of the witnesses were precise about the name of the person who paid the money, the date the money was paid and the amount of money involved. This would permit the inference, had the statements been available, that the witnesses were overzealous and factually inaccurate in their cooperation with the Government purporting to give precise facts about other bribes which facts, their testimony shows, the witnesses did not actually remember.

We will discuss the cross-examination of each of the witnesses about payments received from persons other than petitioner to show that there was prejudice resulting from the failure to obtain the statements because the credibility of each of the witnesses could have been attacked much more effectively with the statements.

Thomas W. Ellington and Seymore Levine

Ellington and Levine were asked no questions on cross-examination about payments they received from other

accountants. Statements of Ellington (Govt. Exs. 109,[n] 110 and 112 for *id.* R. 48a) and Levine (Govt. Exs. 141, 144[m] and 147 for *id.* R. 96a) were sealed by the District Court upon the Government's representation that they did not relate to the direct testimony of the witnesses. Obviously, armed with those statements, petitioner could have effectively attacked the credibility of the witnesses by cross-examining them about other crimes about which no testimony was elicited on cross-examination. The failure to make those statements available resulted in prejudicial error justifying reversal even if it was not prejudicial error to turn over the remaining statements. *Clancy* v. *United States*, 365 U. S. 312, 316 (1961).

The remaining witnesses who testified that they received money from petitioner were asked on cross-examination about payments they received from persons other than petitioner. A summary of their testimony on this subject follows, at the conclusion of which we shall show how the statements withheld from petitioner could have been effectively used on cross-examination and why petitioner was prejudiced by not having these statements available to him.

Jeremiah Clyne

Clyne testified on cross-examination that during his four years and nine months in the Internal Revenue Service, he took money from "somewhere in the neighborhood of about fifteen" taxpayers' representatives on approximately sixty separate occasions (T. 88).[o] He was not

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[n] Portion of Govt. Ex. 109 *id.*, separately marked as Govt. Ex. 108 *id.*, were furnished to the defense (R. 48a).

[m] Portions of Govt. Ex. 144 *id.*, separately marked as Govt. Ex. 143 *id.*, were furnished to the defense (R. 96a).

[o] References with the prefix "T" are to the stenographic transcript of the trial which by stipulation between the parties may be referred to here.

certain of the exact number of taxpayers' representatives from whom he took money (Ibid.). The largest amount that he ever took from a taxpayers' representative was $500 and the smallest amount was "$10, I believe" (Ibid.).

The first time he took money was early in 1960 and he took money in 1962 and 1963 (T. 88-89). He kept no record of money he received from various accountants and did not "know off-hand" approximately how much he received in 1960, although the amount was approximately $600 (T. 90). In 1961 he took approximately $600 (T. 91). In 1962 he took approximately $300, although "it could have been more or it could have been less" (Ibid.). Aside from cash, he received liquor, gift certificates, theatre tickets, baseball tickets and a sweater from taxpayers' representatives (T. 93-94). He did not report these gifts to the Government (T. 95).

Louis R. Deitsch

Deitsch first testified that he did not know exactly on how many separate occasions he took money from accountants. When asked to give an estimate, he said it was about thirty or forty times. Immediately after that he also said "I have no recollection of how many times" (R. 62a). His best recollection was that he usually took from between $25 and $50 from taxpayers' representatives (T. 187). He initially said that he had no recollection as to the first time that he took money from accountants and then said it might have been in 1960 (T. 187). He said he could not "tell you how many exact times," before January of 1961, he received money from taxpayers' representatives, except to say that he did receive money "on some occasions" (T. 189). Deitsch could not say how much he received from taxpayers' representatives in 1960—"I have no way of knowing" (T. 190). He said that it was probably more than $100, and when asked if it was more than $200, repeated "I can't tell you exactly how much I received" (T. 190). He could not remember

how much he received from taxpayers' representatives in 1961, except that he did not think it was more than $500 (T. 190-91). He did not know the year that he received $50 from a certain Mr. Cohen but did remember that a Mr. Meyers paid him $50 in 1961 (T. 191-92). He did not recall on how many occasions he took money from Mr. Meyers in 1961 and, while admitting that he testified against Mr. Meyers in another case, he said that "I don't remember what my testimony was at this time" (T. 192). He did not know how much he received from taxpayers' representatives in 1962 although he did receive money (T. 194). He took money from taxpayers' representatives in 1963 on a few occasions but did not recall the total amount he received in that year (T. 195). Deitsch testified that it is possible that he received liquor from a taxpayers' representative (T. 197). He also testified that he was indicted in other cases and pleaded guilty in each case in which he was indicted (T. 201).

Jeremiah J. Ryan

Ryan testified that during the nine years that he was employed by the Internal Revenue Service, he took money from taxpayers' representatives from 1961 or "thereabouts" to 1964 (R. 74a). In 1960 "perhaps" he took money—"I don't know" (Ibid.). In 1959 he took no money (T. 316-17). He also said that he shared money with other agents "on many occasions" (T. 317). The largest amount of money he ever received was $600 of which he gave $200 to his group chief (T. 319). The total amount of money he received from accountants was about $2,000—"but it would have to be an estimate, because I don't know" (T. 323). He could not approximate the amount of money he received in 1960 (T. 323-24). When asked if he received $50 on or about April 8, 1960 from an accountant named Cohen, he said "at that time in my memory, trusting my memory, I thought it was 1960, and it may have been" (T. 324). He testified that he

pleaded guilty to that charge (T. 324). When asked whether or not he received $40 from a Mr. Reinstein on or about November 17, 1960, he said that it was about that time, but he had no way of pinpointing exactly except with reference to something else (T. 325). Aside from the aforesaid, on two occasions Ryan testified that he had no recollection of receiving any more money from any other taxpayers' representatives or any other agents in 1960 (T. 325).

Ryan said that in 1961 he received several hundred dollars from taxpayers' representatives (T. 326). He also testified that he received several hundred dollars in 1963 (T. 327). Ryan also testified that he received three or four bottles of whiskey from accountants in connection with audits that he handled (T. 329). Ryan testified that he had been indicted in other cases (T. 332).

In connection with the Ryan testimony, under the Jencks Act, petitioner was permitted to inspect Exhibit 126 (R. 73a), part of an affidavit prepared by Ryan. The complete affidavit marked Govt. Ex. 127 was sealed and has not been inspected by us (R. 72a). However, it is apparent from Govt. Ex. 126 and the blank spaces it contains where portions were excluded, that Ryan, listing names, dates and amounts in columns, was most precise about the name of each taxpayer's representative, the amount of money he received from each taxpayer's representative, the taxpayer's name and address, the account number and the approximate date that the money was paid. When this is contrasted with Ryan's testimony summarized above, its value for impeachment purposes becomes apparent.

Jeanne Lupesco

Lupesco testified that she was with the Government fourteen years but did not remember how many years she received money from accountants, although she believed

that the first year was about 1958 or 1959 (T. 887-88). She said that she had no recollection as to how much money she received from accountants in 1958, 1959, 1960 or 1961 (R. 86-87a). She said she had no idea from how many accountants she took money in 1961, 1962 or 1963 (R. 87a). The total amount of money she took over the years was about $1,400. She based that amount on "the figures in my affidavits to the Inspection Service" (R. 88a). (Presumably, these are the very statements at issue.) She could not recollect whether or not she received money from other agents in the Internal Revenue Service (R. 89a). She received gifts of liquor, theatre tickets, clothing and costume jewelry from taxpayers' representatives (R. 89-91a).

Lawrence F. Montello

Montello testified that he received money in a great many cases (R. 105a). During the five years that he was in the audit section of the Internal Revenue Service, he received money from seven or eight accountants, five or six times a year (R. 105-06a). The largest amount he ever received from a taxpayer's representative was about $100 and the smallest amount was $25 (T. 445-46). He received money from one other Internal Revenue Service employee—Mr. Ryan—on or about seven occasions, in the amount of $25 each time (T. 446-47).

We believe that an inspection of the sealed statements will show that they are reasonably precise as to the person who paid the money, the amount paid, the name of the taxpayers involved and the date of payment. The testimony of the witnesses who were asked questions about the receipt of money from accountants other than petitioner was much less precise.

Thus, we believe that on cross-examination the sealed statements could have been effectively used, not only to show each specific crime which the witnesses admitted and

to thereby attack the credibility of each witness, but also to show that the witnesses were precise when they were sitting down with Government agents drafting affidavits about petitioner and other accountants. They also were precise in their direct testimony describing payments received from petitioner. However, they were not nearly as precise when queried on cross-examination about the same matters contained in their affidavits.

Fortified with these affidavits, we believe that effective cross-examination could have been conducted suggesting that the witnesses used the affidavits to memorise the testimony which they gave against petitioner, and that they did not actually remember the events about which they testified. This, we could have suggested, was done in an overzealous effort to cooperate with the Government, in return for leniency.

We respectfully urge that it would be pure speculation to suggest, as the Court of Appeals did in this case, that no effective use could have been made of the witnesses' statements (R. 146-47). The Jencks Act leaves no room to speculate as to how useful statements will be for the purposes of cross-examination or how important the cross-examination will be to a defendant's case. *United States* v. *Ellenbogen*, 341 F. 2d 893 (2d Cir. 1965). In any event, on the authority of *Clancy* v. *United States*, 365 U. S. 312 (1961), since two of the witnesses were asked no questions on cross-examination about other bribes they had taken and since evidence of other bribes that those witnesses took was unavailable to the defense, the harmless error point is not reached. In *Clancy*, this Court said:

> "We put to one side *Rosenberg* v. *United States*, 360 U. S. 367, where a failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to

those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." 365 U. S. at 316.

In *Clancy*, this Court quoting from *Jencks* v. *United States*, 353 U. S. 657, 667 (1957) said:

"Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

In *United States* v. *Ellenbogen, supra,* the Court, in reversing a conviction on the ground that testimony related to similar unlawful dealings with other persons was elicited on direct examination and statements relating to those other dealings were withheld from defense counsel, said:

"Given that the statement 'relates to the subject matter as to which the witness testified,' and that defendant insisted upon having the statement produced, the statute leaves no room for the trial judge, nor for us, to speculate as to how useful this statement will be for purposes of cross-examination or how important such cross-examination will be to defendant's case. . . ." 341 F. 2d at 894.

See also, *Dennis* v. *United States*, 384 U. S. 855, 875 (1966).

Once it is determined that the statements are within the Jencks Act any doubt as to the usefulness of the statements for cross-examination must be resolved in favor of

the defendant. It is respectfully urged that the sealed statements related to the direct testimony of the witnesses within the meaning of the Jencks Act, they were improperly withheld and petitioner was prejudiced.

POINT III

Title 18 U.S.C. § 201(f) which prohibits a person from giving money to a public official "for the proper discharge of official duty" is inconsistent with Title 18 U.S.C. § 201(b) which prohibits the payment of money "corruptly".

Petitioner was convicted of violations of Title 18 U.S.C. § 201(f) (counts 10, 11 and 12) and, on the identical facts, for violations of Title 18 U.S.C. § 201(b) (counts 25, 26 and 27). Those counts are mutually exclusive because § 201(f) prohibits the payment of money "otherwise than provided by law for the proper discharge of official duty . . ." and § 201(b) prohibits the payment of money to public officials "corruptly" and with intent "to influence any official act . . ." The evidence on the remaining counts of the indictment, counts 1 through 9 and 16 through 24, respectively, also was the same. Those counts which charge violations of 26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 201, respectively, are inconsistent in the same manner as counts 10 through 12 and 25 through 27, respectively, because the charge of the Court (R. 121-22a, 123-124a) made it virtually impossible to distinguish between alleged violations of 26 U.S.C. § 7214(a)(2) and 18 U.S.C. § 201(f) on the one hand (the latter being referred to as the "gratuity" counts) (R. 121a) and 18 U.S.C. § 201(b) and 18 U.S.C. § 201, on the other hand (referred to as the "bribery" counts) (R. 118a).

The District Court denied petitioners motion to require the government to go to trial on either the "corruption" or the "gratuity" counts (R. 106a). The Court of Ap-

peals vacated the convictions on the three § 201(f) counts on the ground they were "lesser included offenses" than § 201(b) (R. 144). However, as we shall show, this did not cure the error because it would be pure speculation to conjecture which if any theory the jury would have adopted had only one set of counts been submitted to it.

a. Counts 10 through 12 and Counts 25 through 27, respectively.

Counts 10, 11 and 12 of the indictment charge that the petitioner gave money otherwise than as provided by law to certain public officials "for the proper discharge of official duties" in violation of Title 18 U.S.C. § 201(f). Counts 25, 26 and 27 charge that the same money was paid to the same public officials "corruptly" and "with the intent to influence official acts, to wit, the office audit examinations of income tax returns . . ." in violation of Title 18 U.S.C. § 201(b).

Title 18 U.S.C. § 201(f) provides a maximum two-year sentence and a $10,000 fine for the following:

> "(f) Whoever, otherwise than as provided by law *for the proper discharge of official duty*, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . ." (emphasis supplied)

Title 18 U.S.C. § 201(b) provides, among other things, a maximum fifteen-year sentence and a $20,000 fine for the following:

> "(b) Whoever, directly or indirectly, *corruptly* gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any

person who has been selected to be a public official to give anything of value to any other person or entity, *with intent*—

(1) *to influence any official act* or . . . ." (emphasis supplied)

Thus, Counts 10 and 25 charge that on June 14, 1963 petitioner gave J. Clyne, an Internal Revenue Service employee, $75 in connection with the audit of the 1961 income tax return of A. & E. Jacs. Counts 11 and 26 charge that on January 28, 1963 petitioner gave L. Montello, an Internal Revenue Service employee, $50 in connection with the audit of the 1961 income tax return of R. & J. Hurley. Counts 12 and 27 charge that on October 2, 1963 petitioner gave J. Ryan, an Internal Revenue Service employee, $50 in connection with the audit of the 1962 income tax return of A. and M. Mountrey (R. 8a-11a).

The only difference between those two series of counts is that Counts 10, 11 and 12 charge that the money was paid by petitioner for the "proper" discharge of duties of certain Government officials and Counts 25, 26 and 27 allege that the money was paid by petitioner "corruptly" and with "intent to influence official acts." The two series of counts are inconsistent with each other for it is impossible to pay money for the "proper" discharge of an official act and, at the same time, to pay the same money with a "corrupt" intent to influence the same official act.

Nevertheless, the jury found petitioner guilty of each of the aforesaid counts.

The charge of the Court was inconsistent in the same manner as the indictment and compounded the error by making it absolutely clear that on the same facts the jury could find petitioner guilty of paying money for the proper and improper audit of the same return. With respect to Counts 10, 11 and 12 the Court charged that the Government must prove beyond a reasonable doubt that the money

was given "for the proper discharge of the official duties . . ." of the Government employee (R. 122a, See R. 120a). With respect to Counts 25, 26 and 27 the Court charged that the Government must prove beyond a reasonable doubt that the money was paid "with a corrupt intent to influence such employee in the performance of his official capacity in a matter then pending before him" (R. 118-19a). The Court also said with respect to Counts 25, 26 and 27:

> "In short, the underlying basis of these crimes is that the defendant must have an evil or corrupt intent to influence the government employee in a matter then pending before him. If it isn't pending before him, he could not logically have any intent to influence; and accordingly, if those facts are the facts you find, then you must acquit." (R. 119a)

It is apparent that if the money was given for the proper discharge of duties it could not have been given with an evil or corrupt intent to influence the Government employee and, as we shall explain below, where a guilty verdict on one count negatives a finding of guilty on another count the two verdicts cannot stand.

b. Counts 1 through 9 and Counts 16 through 24, respectively.

The evidence adduced to prove Counts 1 through 9 and Counts 16 through 24, respectively, was the same. Those counts are inconsistent in the same manner as Counts 10 through 12 and 25 through 27, respectively.

While Counts 1 through 9 do not contain the word "proper", the charge on these counts immediately followed the charge on Counts 10, 11 and 12, and, with respect to the question of whether payment was made for the proper discharge of official duties is concerned, the jury could not have distinguished between the elements necessary to prove Counts 1 through 9 and the elements necessary to prove Counts 10, 11 and 12.

From the very outset of the case, Counts 1 through 9 and Counts 10 through 12 were discussed as crimes with the same elements by the prosecutor who said in his opening:

> "Counts 1 through 12 of the indictment, the first 12 counts, refer to these 12 payments and charge in essence the defendant, Umans, with what can be characterized as the passing of a 'gratuity'—that is, the knowing payment of money—to an Internal Revenue Service agent for the performance of his duty, the audit of an income tax return." (R. 27a)

At the conclusion of the case, with respect to Counts 10, 11 and 12, the Court below charged that the Government must prove each of the following elements beyond a reasonable doubt:

> "(1) that the defendant did give a sum of money to the agents named—that is, to Clyne, Montello, and Ryan; (2) that his money was given otherwise than as provided by law for the proper discharge of the official duties of such employee; and (3) that this money was given for and because of official acts performed or to be performed by the said employee, to wit, the official audit examination of the income tax returns therein named." (R. 122a)

The charge with respect to Counts 1 through 9 followed almost immediately and with respect to these counts the Court said:

> "Under these nine charges you, of course, must first determine whether, on or about the dates mentioned, Deitsch, Ellington, Lupesco or Ryan were employees of the Internal Revenue Service; two, whether they were acting on those dates in connection with any Revenue law of the United States; and three, whether each received, on or about the dates mentioned, a fee, compensation or reward except as by law prescribed

for the performance of any duty; and if they did, did the defendant in each particular count aid and abet, induce or procure such receipt." (R. 123a)

At the conclusion of the Government's case the Court denied appellant's motion for an order directing the Government to elect to go to the jury on the twelve "gratuity" counts (1 through 12) or on the twelve "corruption" counts (16 through 27) (R. 106-07a). This we believe was prejudicial error.

If a guilty verdict on one count negatives a fact essential to a finding of guilty on a second count, the two guilty verdicts cannot stand, *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (5th Cir. 1963); *Thomas* v. *United States*, 314 F. 2d 936 (5th Cir.) cert. denied 375 U. S. 849 (1963).

In the *Marquez-Anaya* case, the defendants were charged with smuggling marihuana and also were charged with being transferees of the same marihuana which had been smuggled. Thus, the defendants, in effect, were found guilty of having acquired marihuana in Mexico for the purpose of smuggling it into the United States, and having transferred the same marihuana in the United States. The Court held that the conviction of one of the counts could not be sustained because of the obvious inconsistency. Similarly, in *Thomas* v. *United States, supra*, the defendants were found guilty of acquiring marihuana in Mexico and acquiring the same marihuana in the United States. The Court held that the two guilty verdicts could not stand.

In *United States* v. *Daigle*, 149 F. Supp. 409 (D.C.D.C.), aff'd 248 F. 2d 608 (D. C. Cir. 1957), cert, den. 355 U. S. 913 (1958), the Court said:

"where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand." 149 F. Supp. at 414.

In *Fulton* v. *United States*, 45 App. D. C. 27 (1916), the indictment charged that certain embezzled property belonged to a man named Smith and, in another count charged that the same property belonged to Smith and other named persons. The defendant was found guilty of both counts and the Court reversing the conviction on each count said:

> "If this money belonged to Smith individually, it could not have belonged to him and the other persons named. And yet the jury has found that it could and did. . . . The indictment charged the embezzlement of a lump sum, and the proposition is too plain to admit of argument that if the jury had found that this sum belonged to Smith, such a finding negatived the possibility of ownership in anyone else. On the other hand, a finding that it belonged to Smith and the other persons named in the third count of the indictment, negatived the averment in the first count that it belonged to Smith alone." 45 App. D. C. at 41.

In *Davis* v. *United States*, 37 App. D. C. 126 (1911), the defendant was found guilty of obtaining property by false pretenses and embezzling the same property. In reversing the judgment of conviction below, the Court said that the verdict under the embezzlement counts negatived one essential fact in the crime of procuring money by false pretenses, namely, the divesting of the title originally.

It should be noted that this error requires that judgment on each of the counts of the indictment be reversed because it would be pure speculation to attempt to determine which, if any, of the counts would have resulted in conviction if the jury had been properly charged. Both in *Fulton* and *Davis, supra*, the judgment as to each of the inconsistent counts was reversed. In *Davis*, the Court said:

> "It is not the province of the court to conjecture which theory the jury would have adopted had their attention been drawn to the matter. That is a question for their determination." 37 App. D. C. at 133-34.

In *Fulton*, the Court said:

> "Moreover, while the sentence imposed does not exceed the maximum penalty possible under a conviction upon either count, it is mere conjecture to say that the court was not influenced by the double conviction. We conclude that the court committed error in permitting the jury to return a verdict of guilty upon both counts." 45 App. D. C. at 42.

This case in this respect is distinguishable from *Thomas* v. *United States, supra,* and *Marquez-Anaya* v. *United States, supra,* because in each of those cases the evidence demonstrated that one of the two inconsistent facts was the only one which the jury could have properly found. In the instant case it is impossible to argue from the evidence that one series of counts rather than the other is the only one permissible from the evidence.

Similarly, *United States* v. *Daigle, supra,* also is distinguishable in this respect because the charge to the jury correctly permitted a guilty verdict on only one of the two inconsistent possibilities but the jury brought in guilty verdicts on both counts. In the instant case, as stated above, the charge of the court was consistent with the statutes and, within the framework of the charge, the jury was permitted to find petitioner guilty of inconsistent counts of the indictment.

The Court permitted the jury to find petitioner guilty of crimes which are mutually inconsistent because one of the elements of Counts 1 through 12 (money paid for the proper discharge of official duties) negatives an element of Counts 16 through 27 (money paid for the improper discharge of official duties). Therefore, we respectfully urge that the conviction on each count of the indictment against petitioner be reversed.

POINT IV

Petitioner was improperly convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which necessarily requires the acts of two people and with respect to which petitioner could not be an aider and abettor.

Petitioner, in Counts 1 through 9 of the indictment, was convicted of aiding and abetting violations of 26 U.S.C. § 7214(a)(2) which, as applied to this case, prohibits Internal Revenue agents from accepting money otherwise than as prescribed by law for the performance of their duties. Under the circumstances of this case in which petitioner is accused of having *paid* the money, petitioner may not be convicted of being an aider and abettor in the *receipt* of the bribe because it is impossible to commit the substantive offense without cooperative action. Petitioner's timely motion to dismiss these counts of the indictment was denied (R. 14a, 23-24a).

There is no decision by this Court on this issue involving violations of 26 U.S.C. §7214(a)(2). The Court of Appeals for the Second Circuit in this case and in *United States* v. *Kenner*, 354 F. 2d 780 (2 Cir. 1965), cert. denied 383 U. S. 958 (1966) has rejected this argument.

Title 26 U.S.C. § 7214(a)(2) provides in pertinent part as follows:

> "(a) Unlawful acts of revenue officers or agents—Any officer or employee of the United States acting in connection with any revenue law of the United States— • • • (2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; • • • shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than

$10,000, or imprisoned not more than 5 years, or both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution."

The aiding and abetting statute 18 U.S.C. § 2, which is designed to punish aiders and abettors as principals, could not have been intended to cover § 7214(a)(2) where the alleged aider is the payor of the bribe because a man who pays a bribe to a Government official will not be a Government official himself and therefore he cannot be dismissed from office or discharged from employment, which is one of the penalties imposed for violating this statute.

Moreover an aider and abettor should stand in the same relation to the crime as the principal. Another government employee who participates with a principal in the receipt of a bribe might properly be classified as an aider and abettor, but the payer of a bribe is on the opposite side of the transaction and is necessary to consummate the bribe. Thus, it is impossible for the aider and abettor to be the payer of the bribe.

While as stated above there is no decision of this Court involving this statute, there are other decisions involving different statutes requiring the acts of two people which are helpful because they are analogous.

In *Gebardi v. United States*, 287 U. S. 112 (1932), this Court reversed a Mann Act conviction of a man and the woman he was accused of transporting across State lines for purposes of prostitution. This Court, citing numerous authorities, said that "where it is impossible under any circumstances to commit the substantive offense without

cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law, ... or under the federal statute." *Id.* at 122. The Court also said that it was resting its decision on the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent. *Id.* at 123.

In *United States* v. *Kats*, 271 U. S. 354 (1926), the defendants, the buyer and seller of liquor, were indicted for conspiracy to sell intoxicating liquors. This Court affirmed the quashing of an indictment and said "but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity." *Id.* at 355.

In *United States* v. *Sager*, 49 F. 2d 725 (2d Cir. 1931), the Court of Appeals for the Second Circuit said that "where concert is necessary to an offense, conspiracy does not lie." *Id.* at 727, and on that ground dismissed that count of an indictment alleging concert between several intended givers of a bribe and the intended taker of the same bribe.

See also *United States* v. *Dietrich*, 126 F. 664 (C.C.D. Neb. 1904), in which the charge was that one of the defendants agreed to give and one of the defendants agreed to receive a bribe in violation of the federal bribery statute, and *United States* v. *New York Cent. & H.R.R. Co.*, 146 F. 298 (C.C.S.D.N.Y. 1906), affirmed 212 U. S. 481 (1909), in which the charge was that one of the defendants should give and the other receive an unlawful rebate in violation of the Interstate Commerce Act. In those cases the conspiracy counts were dismissed.

The fact that the aforesaid cases were conspiracy cases and the instant case is an aiding and abetting case is a

distinction without a difference for if the charge of conspiracy will not lie because the crime itself requires concert of action then the aiding and abetting charge will not lie for the same reason. Cf. *Gebardi* v. *United States, supra,* at 119; *Nye and Nissen* v. *United States,* 336 U. S. 613 (1949).

This Court in *Gebardi* v. *United States, supra,* and *United States* v. *Katz, supra,* examined the intent of the Legislature in determining that a Mann Act conviction of a man and the woman he was accused of transporting across state lines for the purposes of prostitution could not stand, and in determining that a conspiracy to sell intoxicating liquors would not lie if the only persons accused are the buyer and the seller. In the instant case, an examination of the intent of the Legislature, as shown by the language of the statute itself, leads to the same conclusion. Title 26 U.S.C. § 7214(a)(2) provides, among other things, as a penalty, that the offender shall be dismissed from office or discharged from employment. Petitioner not being a public official could not be dismissed from office or discharged from employment.

Moreover, it would have been a simple matter for Congress, before 1963, to enact a statute having the same elements of § 7214(a)(2) encompassing the payer of money without intent to influence official acts rather than just the recipient. This was done in 1963 with the amendment to Title 18 U.S.C. § 201 which now is 201(f). To permit the Government through the use of 18 U.S.C. § 2 to bring in the alleged payer of money as an aider and abettor is inconsistent with the intent of the Legislature and with those cases which hold that a conspiracy count will not lie, where the crime necessarily requires the acts of two people and those very two people are the accused.

May v. *United States,* 175 F. 2d 994 (D. C. Cir.), cert. denied 338 U. S. 830 (1949), relied upon by the Court of Appeals in affirming *United States* v. *Kenner, supra,*

and other cases similar to it are distinguishable. See, for example, *United States* v. *Holte*, 236 U. S. 140 (1915); *Ex parte O'Leary*, 53 F. 2d 956 (7th Cir.), cert. denied 283 U. S. 830 (1931); *Vannata* v. *United States*, 289 F. 424 (2d Cir. 1923). Thus, for example, *May* v. *United States, supra*, and *Ex parte O'Leary, supra*, involve more than merely the givers and the receivers of the bribe. They involve conspiracies among other persons. Similarly, *Vannata* v. *United States, supra*, involves more than the purchaser and seller of whiskey. It is certainly consistent with the theory we are urging to have the receiver of the bribe conspire with more than one person to receive a bribe. In *United States* v. *Holte, supra*, the Court found that the substantive offense might be committed by one person alone making that case distinguishable.

We believe that the Congressional intent of this particular statute as manifested by its language in penalizing persons by requiring them to forfeit their jobs, and the fact that Congress did not see fit until 1963 to pass a statute penalizing a giver of a bribe under these circumstances, leads to the conclusion that it was improper to indict the petitioner for aiding and abetting a violation of Title 26 U.S.C. § 7214(a)(2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the indictment should be quashed.

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August, 1967.

APPENDIX

Title 18 U.S.C. § 201 (as effective until January 20, 1963) provides:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof; with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Title 18 U.S.C. § 201 (which became effective January 21, 1963) provides in pertinent part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has ben selected to be a public official to do or omit to do any act in violation of his lawful duty,

* * * * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * * *

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

* * * * *

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Title 26 U.S.C. § 7214 provides in pertinent part:

(a) Any officer or employee of the United States acting in connection with any revenue law of the United States—

* * * * *

(2) who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty;

* * * * *

Shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both. * * *

Title 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18 U.S.C. § 3500 provides in pertinent part:

* * * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains

matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant and the defendant objects to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.